12

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted] 120

EDGAR G. MONDOU, PLAINTIFF IN ERROR,

vs.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

FILED AUGUST 27, 1909.

(21,805.)

(21,805.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 579.

EDGAR G. MONDOU, PLAINTIFF IN ERROR,

vs.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 22, 1909.

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a To all — whom these presents shall come, Greeting:

Know ye, that I, George E. Parsons, Clerk of the Supreme Court of Errors of the State of Connecticut, in and for the Second Judicial District, in said State, having inspected the files and records of said court, in my custody, do find there remaining on file a certain record in an appeal taken by Edgar G. Mondou, appellant and in which the New York, New Haven and Hartford Railroad Company were appellees, in a cause wherein Edgar G. Mondou was plaintiff and the New York, New Haven and Hartford Railroad Company was defendant, in the words and figures following, to wit:

b STATE OF CONNECTICUT:

Supreme Court of Errors, New London County, Second Judicial District, April Term, 1909.

(16.)

EDGAR G. MONDOU
vs.
N. Y., N. H. & H. R. R. Co.

Plaintiff's Appeal.

For Plaintiff: Brown & Perkins, Kelly.
For Defendant: J. F. Berry, Brandegee, Kenealy & Brennan.

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1 Supreme Court of Errors, Second Judicial District, New London County, April Term, A. D. 1909.

EDGAR G. MONDOU
vs.
N. Y., N. H. & H. R. R. Co.

Superior Court, New London County, February Session, A. D. 1909.

Plaintiff's Appeal.

To the Sheriff of the County of New Haven, his Deputy, or either Constable of the Town of New Haven, within said County, Greeting:

By authority of the State of Connecticut, you are hereby commanded to summon the New York, New Haven & Hartford Rail-

road Company, a legal corporation organized and existing under and by virtue of the laws of this State and located in said New Haven, to appear before the Superior Court to be held in and for the County of New London on the first Tuesday of December, A. D. 1908; then and there to answer unto Edgar G. Mondou, of Norwich, Connecticut, in a civil action wherein the plaintiff complains and says:

1. On August 5th, 1908, the defendant owned, controlled and operated a certain railroad extending from New York City in the State of New York to and through the States of Connecticut, Rhode Island and Massachusetts to the City of Boston in said Massachusetts, and then owned and used upon said railroad sundry cars and engines propelled by steam and was then a common carrier engaged
2 in maintaining and operating said railroad as such common carrier of merchandise and passengers in its said cars over its said railroad and was then engaged in trade or commerce in and through and between the said several States of New York, Connecticut, Rhode Island and Massachusetts.

2. On said day the plaintiff was in the employment of the defendant as a fireman on one of the engines of the defendant attached to and drawing one of the freight trains of defendant known as M. H.
3 from Midway in the State of Connecticut through said State of Connecticut and to and through the State of New York to Harlem River, and on said train the defendant was then engaged in transporting goods, wares and merchandise carried in and upon the freight cars composing said train as a common carrier and was then engaged in trade and commerce between said States of Massachusetts, Rhode Island, Connecticut and New York, and it was the duty of the plaintiff in the regular course of his said employment to be upon said engine and tender attached thereto in performing his duty as fireman in firing said engine.

3. At the same time the defendant also ran and operated on its said railroad in a direction opposite to that which the train described in paragraph 2 was running, a similar train composed of an engine and tender and a large number of freight cars attached thereto, from Harlem River in the State of New York to Midway in the State of Connecticut, said cars then being loaded with goods, wares and merchandise which the defendant was then transporting on said train as a common carrier, then engaged in trade and commerce between said States of New York, Connecticut, Rhode Island and Massachusetts, and said train was running upon defendant's east bound track close to defendant's west bound track on which the defendant was running said train described in paragraph 2, and said trains passed each other while running as above described a few minutes after ten o'clock at night on said August 5th, 1908, at a point between Guilford and Sachem's Head, in the State of Connecticut.

4. The defendant so negligently conducted its said business
3 and operated its said trains that through its negligence and that of its servats and agents engaged in its said business of making up and operating its said trains, the defendant received, connected to and made up as a part of its said train described in paragraph 3, a certain freight car belonging to a railroad company of another State,

and the box, bearing and journal of one of the trucks of said car were then defective and insufficient and out of repair and the defendant negligently failed to inspect and discover the same and so negligently conducted itself that it failed to discover the condition of said car and negligently failed to remedy the same or to supply a suitable and proper bearing, or any or sufficient oil for the bearing upon said truck, and negligently ran and suffered and permitted said car to be run as a part of said train from said Harlem River to Guilford, Connecticut.

5. And thereupon by reason of the facts set forth in paragraph 4, said bearing, journal and box upon the truck of said foreign car became hot, all of which was known to the defendant's servants and agents in charge of said train, or would have been known to them had they exercised reasonable care in the premises, and they negligently failed to remedy said trouble, or to cut out said car and negligently continued to run the same with said train and by reason thereof the journal on one of the trucks of said car burned off and said truck was thereby caused to jump the track and the wheels of said truck then ran upon the ties and roadbed, all of which happened before and a long distance away from the point at which said train met and passed the train described in paragraph 2, and the top of said foreign car was thereby tilted and thrown over so far towards said west bound track that it would strike and rake a train on said west bound track, all of which was known to the defendant's servants and agents on said train, or would have been known to them had they exercised reasonable care in the premises.

6. And thereupon when said train so operated and in the condition above described met and was passing said train described
4 in paragraph 2, on the engine of which was the plaintiff, who, in the exercise of all due care on his part, was standing with his left hand holding to the hand-hold on the corner of the tender of said engine, the top of said foreign car struck and raked along said engine and tender and thereby cut off the plaintiff's thumb and jammed said hand-hold down against the plaintiff's hand and thereby crushed and broke all the bones of his hand and tore the skin, flesh and arteries of said hand apart and so injured the same that his hand had to be amputated at the wrist, and the plaintiff was thereby caused great suffering of both body and mind and put to a large expense, to wit: five hundred dollars ($500) for medicines, medical care and attendance and was confined to the hospital and his house for a long period of time, and is permanently disfigured and disabled from performing his regular business, which was a fireman as aforesaid, at which he earned three dollars ($3.00) per day.

The plaintiff claims $25,000 damages, under and by force of the act of Congress entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases." Approved April 22d, 1908.

Lucius Brown, of Norwich, is recognized in $50, to prosecute, etc.

Of this writ, with your doings thereon, make due service and return.

Dated at Norwich, this thirty-first day of October, A. D. 1908.

DONALD G. PERKINS,
Justice of the Peace for New London County.

5 Superior Court, New London County.

JAN. 15, 1909.

EDGAR G. MONDOU
v.
NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

Demurrer.

The defendant demurs to the plaintiff's complaint:

1. Because it does not appear therein that the negligence complained of was the negligence of such servants or agents of the defendant as stood in the position of vice-principals.

2. Because it appears from the allegations of the plaintiff's complaint that the sole negligence complained of was the negligence of fellow-servants of the plaintiff.

The defendant demurs to the plaintiff's claim for relief under the Act of Congress approved April 22, 1908, because

1. Congress was without power to pass said act.

2. Said act is not a regulation of commerce with foreign nations and among the several states and among the Indian tribes, and was not within the power of Congress to enact.

3. Said act is an attempt to legislate solely upon the subject of the relations between master and servant, and was therefore beyond the authority of Congress to enact.

4. Said act denies to the defendant the right to contract upon consideration with any one of its employés engaged in inter-state commerce for its exemption from liability for damages sustained by such employee through his own contributory negligence or from liability for damages sustained by him through the negligence of his fellow-servants, and it also denies to all of such employés their right to contract with the defendant, upon consideration, for such exemption of liability of the defendant, and is therefore void.

5. Said action is brought upon an act of the Congress of the United States, and the cause of action set forth in the com-
6 plaint is not based upon a violation by the defendant of any law of the state of Connecticut, or a breach by the defendant of any duty towards the plaintiff under any law of this State.

6. The obligations and liabilities imposed by the laws of this State upon the defendant arising from its acts set forth in the complaint are fundamentally different from the obligations and liabilities imposed upon it by reason of said acts under and by the said act of Congress, in that the defendant is not under the laws of this State liable in damages to the plaintiff upon the facts as set forth, while

under the provisions of said act of Congress, it is liable in damages therefor to the plaintiff.

7. The provisions of said act of Congress are contrary to the settled policy of this State.

THE DEFENDANT,
By BRANDEGEE, KENEALY & BRENNAN, *Its Attorneys.*

Filed Jan. 16, 1909.

HIBBERD R. NORMAN,
Assistant Clerk.

Superior Court, New London County.

MAR. 5, 1909.

EDGAR G. MONDOU
v.
NEW YORK, NEW HAVEN & HARTFORD R. R. CO.

Motion for Leave to Amend Demurrer.

The defendant moves for leave to file an amendment to its demurrer in the above entitled action, by adding thereto the following paragraph 8, viz:

8. Said Act of Congress is contrary to Article V of the Amendments to the Constitution of the United States because

7 (1) Said act includes within its provisions inter-state employés of railroads alone, and, in consequence, it does not bring within its class all employés similarly situated, namely,

(*a*) The interstate employés of other interstate carriers, and,

(*b*) The interstate employés of all other persons engaged in interstate commerce.

(2) Said Act includes within its terms not only those railroad employés whose occupations are attended by the hazards peculiar to railroading, but also all other employés of interstate railroads whose occupations are in no wise attended with such hazards;

(3) Said Act includes within its terms one class only of interstate employers, to wit, railroads; and this without regard to the hazards of the employment.

DEFENDANT,
By BRANDEGEE, KENEALY & BRENNAN, *Its Attorneys.*

Filed Mar. 5, 1909.

HIBBERD R. NORMAN,
Assistant Clerk.

Granted March 19th, 1909.

R. WHEELER, *J.*

Superior Court, New London County.

APRIL 5TH, 1909.

EDGAR G. MONDOU
vs.
THE NEW YORK, NEW HAVEN & HARTFORD R. R. CO.

Memorandum on Demurrer to Complaint.

The amended demurrer is sustained upon all the grounds stated in the several paragraphs of the demurrer except the 6th and 7th paragraphs, and also upon the ground stated in the 8th paragraph of the amendment.

R. WHEELER, *J.*

8 Judgment File, — Court.

No. 595.

Superior Court of the State of Connecticut, New London County.

APRIL 12TH, 1909.

EDGAR G. MONDOU, of Norwich, Connecticut,
vs.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, a Legal Corporation of Connecticut.

This action, by writ and complaint claiming Twenty Five Thousand Dollars, damages, was returned to this Court on the first Tuesday of December, 1908, and thence by continuance came to the present time, when the parties appeared, and were at issue on demurrer as on file.

The Court having heard the parties, finds the issues for the Defendant, and that said complaint is insufficient.

Whereupon it is adjudged, that the Defendant, recover of the Plaintiff its costs taxed at Thirty Six Dollars.

By the Court.

GEORGE E. PARSONS, *Clerk.*

Superior Court, New London County.

APRIL 12TH, 1909.

EDGAR G. MONDOU
vs.
N. Y., N. H. & H. R. R. Co.

Notice of Appeal.

Notice is hereby given that the plaintiff appeals from the judgment rendered in the above entitled action to the Supreme Court

9 of Errors in and for the Second Judicial District at its term next to be held after the filing of said appeal.

EDGAR G. MONDOU,
By BROWN & PERKINS,
His Attorneys.

Filed Apr. 12, 1909.

HIBBERD R. NORMAN,
Assistant Clerk.

Superior Court, New London County.

APRIL 12TH, 1909.

EDGAR G. MONDOU
vs.
N. Y., N. H. & H. R. R. Co.

Plaintiff's Appeal.

In the above entitled case the plaintiff appeals from the judgment of said Court to the Supreme Court of Errors in and for the Second Judicial District, to be held at Norwich on the last Tuesday of April, A. D. 1909, for the revision of the errors which he claims to have occurred in the trial thereof and for reasons of said appeal he assigns the following:

1. Sustaining the defendant's demurrer to the plaintiff's complaint on the ground that the Act of Congress, on which said complaint is based, is unconstitutional and void, and for said reasons rendering judgment against the plaintiff and in favor of the defendant to recover its costs.

He therefore prays for such relief as is provided by law in the premises.

EDGAR G. MONDOU,
By BROWN & PERKINS & KELLEY,
His Attorneys.

10 I certify that the foregoing appeal was filed on the 12th day of April, A. D. 1909, and Lucius Brown of Norwich, is recognized in the sum of One Hundred Dollars, conditioned that the said Edgar G. Mondou shall prosecute said appeal to effect and pay all costs therein if he shall fail to do so; and said appeal is hereby allowed.

GEORGE E. PARSONS, *Clerk.*

Supreme Court of Errors, New London County.

CLERK'S OFFICE.

The above and foregoing is a true copy of the record in said case to be used in the trial in the Supreme Court of Errors.

Attest:

GEORGE E. PARSONS, *Clerk.*

11 Supreme Court of Errors, Second Judicial District.

APRIL 27TH, 1909.

EDGAR G. MONDOU
v.
NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

Petition of the United States Attorney.

To the Honorable Supreme Court of Errors of the State of Connecticut:

Your petitioner respectfully represents that he is United States Attorney for the District of Connecticut; that in the above entitled cause of Edgar G. Mondou vs. the New York, New Haven & Hartford Railroad Company, now pending in this Honorable Court, the principal question involved is the validity and constitutionality of the Act of Congress entitled "An Act Relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22nd, 1908; that the Government of the United States is desirous that said Act of Congress may be held by the courts to be valid; that the matter involved in this case, to wit, the validity of said Act of Congress, is a question of large public concern of importance to the people of the United States as a whole, and the decision of this Honorable Court upon the validity of said statute will not alone affect the parties to this particular litigation but will be of far-reaching importance to the public; and that the Department of Justice of the United States Government is desirous that your petitioner may be granted permission as amicus curiæ to file a brief in this case on behalf of the United States.

Wherefore, your petitioner respectfully prays this Honorable Court to grant him, as amicus curiæ, permission to file a brief in the above entitled action on behalf of the United States; and that a reasonable time may be allowed to him in which to prepare and submit such brief.

Respectfully submitted,

JOHN T. ROBINSON,
United States Attorney.

Filed April 27th, 1909.

GEORGE E. PARSONS, *Clerk.*

12 New Haven County, June Term, 1909.

MONDOU
v.
N. Y., N. H. & H. R. R. Co.

Action for personal injuries to the plaintiff while employed as a fireman on a railroad train running between States; brought to the

Superior Court for New London County, and heard on demurrer by Ralph Wheeler, J. Demurrer sustained and judgment for defendant.

No error.

13 BALDWIN, *C. J.*:

The complaint alleges that the plaintiff, while employed by the defendant as a fireman on a railroad train running from Midway, Connecticut, to the Harlem river, in New York, was injured while in the exercise of due care, by the negligence of the defendant and its servants and agents in receiving a foreign car, which was defective and in a dangerous condition, without inspecting it, and putting it into another train running in the opposite direction from the Harlem river to Midway, in consequence of which, as the trains met in Guilford in this State on August 5, 1908, the top of the car tilted over and struck the plaintiff. It concludes thus: "The plaintiff claims $25,000 damages, under and by force of the act of Congress entitled 'An Act relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases.' Approved April 22d, 1908." The suit was brought in October, 1908. A demurrer was filed attacking both the complaint and the claim for relief.

Both parties have treated the action as one brought upon the Act of Congress of April 22d, 1908, and we shall therefore accept that view, as did the Superior Court.

Thus considered, the demurrer was properly sustained, for reasons fully stated in the case of Hoxie v. N. Y., N. H. & H. R. R. Co., *ante*.

We think it proper, however, to observe, in order to avoid any misconstruction of our position in subsequent cases, that the complaint charges the defendant directly with negligence in respect to the duty of inspecting the foreign car. It owed an absolute duty to the plaintiff to use reasonable care in inspecting the condition of all the rolling stock used upon its railroad. The demurrer admitted that it failed to exercise such care and that the plaintiff exercised due care, and as the suit was brought within four months from the date of the injury to the plaintiff, he would have made out a *prima facie* case, had he not chosen to claim his remedy under the Act of Congress, instead of under the laws of Connecticut.

There is no error.

In this opinion the other judges concurred.

The foregoing is a true copy of the original opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports.

JAMES P. ANDREWS,
Reporter.

14 At a Supreme Court of Errors of the State of Connecticut in the Second Judicial District, held at Norwich, in the County of New London, on the last Tuesday of April, 1909.

No. 16.

EDGAR G. MONDOU, of Norwich, Connecticut,
vs.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, a Legal Corporation of Connecticut.

On Appeal from the Superior Court, February Session, 1909, New London County.

This appeal by the plaintiff claiming error in the process, record, and judgment, and in the proceedings and decisions of the Court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this Court, was allowed by the Clerk of the Superior Court for New London County on the 12th day of April, 1909, and came to this Court at its term at Norwich on the last Tuesday of April, 1909, and by agreement of Counsel and consent of the Court said cause was transferred for argument to the First Judicial District at its May Term, 1909, and thence to the Third Judicial District at New Haven at its June Term, 1909; when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment and proceedings of said Superior Court there is no error.

It is therefore considered and adjudged that the appellee recover of the appellant costs of suit $—.

By the Court,

GEORGE E. PARSONS, *Clerk*.

15 All of which I have caused by these presents to be Exemplified, and the Seal of the Supreme Court of Errors of the State of Connecticut to be hereunto affixed, and do hereby certify that the within and foregoing is a true copy of said original Files and Record.

In testimony whereof, I hereunto set my hand, and affix the Seal of said Court, at Norwich, in said District and State, this 20th day of August, 1909.

[Seal Supreme Court of Errors, Conn.]

GEORGE E. PARSONS, *Clerk*.

16 STATE OF CONNECTICUT,
Supreme Court of Errors, ss:

I, Simeon E. Baldwin, Chief Justice of the Supreme Court of Errors of the State of Connecticut, do hereby certify, that George E. Parsons, whose name is subscribed to the preceding exemplification is Clerk of the said Supreme Court of Errors in and for the said Second Judicial District, duly appointed and sworn; that the above is his

genuine official signature, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to said exemplification is the Seal of the said Supreme Court of Errors, and that the foregoing attestation is in due form.

Dated at New Haven, this 21 day of August, 1909.

SIMEON E. BALDWIN,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

17 STATE OF CONNECTICUT,
Supreme Court of Errors,
Second Judicial District, ss:

I, George E. Parsons, Clerk of said Court, do hereby certify that Honorable Simeon E. Baldwin, whose name is subscribed to the preceding certificate, is the Chief Justice of the Supreme Court of Errors of the State of Connecticut, duly appointed and qualified; and that the signature of the said Chief Justice to said certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court this 20th day of August, 1909.

[Seal Supreme Court of Errors, Conn.]

GEORGE E. PARSONS,
Clerk of Supreme Court of Errors of Connecticut, Second Judicial District.

18 STATE OF CONNECTICUT:

Supreme Court of Errors, Second Judicial District, New London County, April Term, 1909.

EDGAR G. MONDOU
vs.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Assignment of Errors.

Now comes the above appellant, Edgar G. Mondou, and files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

The Supreme Court of Errors of Connecticut erred in holding and deciding that there was no error in the decision of the Superior Court, in said case, sustaining the defendant's demurrer to the plaintiff's complaint on the ground that the act of Congress on which said complaint is based is unconstitutional and void and for said reasons rendering judgment against the plaintiff and in favor of the defendant to recover its costs, the cause of action set forth in said complaint being a right and privilege specially claimed by said Edgar G. Mondou under the act of Congress approved April 22, 1908, entitled

"An Act Relating to the Liability of Common Carriers by Railroads to their Employés in Certain Cases," and in affirming said judgment of the Superior Court.

Said errors are more particularly set forth as follows:

Said Court erred in holding and deciding;

First. That under the above described act of Congress the Superior Court of the State of Connecticut had no jurisdiction of the
19 above described action and complaint of the plaintiff based upon said act of Congress and in ruling and holding for said reasons that said complaint was insufficient and that there was no error in the decision of said Superior Court in sustaining said demurrer.

Second. That under the above described act of Congress the Superior Court of the State of Connecticut could not be required by the Congress of the United States to take jurisdiction of said action of the plaintiff based upon said act of Congress and that said act of Congress was for said reason unconstitutional and void and that there was no error in the decision of said Superior Court in sustaining said demurrer.

Third. That the said act of Congress was unconstitutional and void as exceeding the power of Congress in regulating commerce and that the plaintiff's complaint based thereon was insufficient and that there was no error in the decision of the Superior Court in sustaining said demurrer.

For which errors the said appellant, Edgar G. Mondou, prays that the judgment of the said Supreme Court of Errors, dated July —, 1909, be reversed, and a judgment entered for the appellant, Edgar G. Mondou, and for costs.

EDGAR G. MONDOU,
By DONALD G. PERKINS,
His Attorney.

[Endorsed:] Supreme Court of Errors, Second Judicial District. Edgar G. Mondou vs. New York, New Haven & Hartford R. R. Co. Copy of Assignment of Errors in Writ of Error. Filed this 20th day of August, 1909. Geo. E. Parsons, Clerk of Supreme Court of Errors, Second Judicial District.

20 STATE OF CONNECTICUT:

Supreme Court of Errors, Second Judicial District, New London County, April Term, 1909.

EDGAR G. MONDOU, Appellant,
vs.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Appellee.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the Supreme Court of Errors in rendering judgment against him in the

above entitled case, the plaintiff, Edgar G. Mondou, hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States, and submits an assignment of errors herewith.

DONALD G. PERKINS,
Attorney for Edgar G. Mondou, Appellant.

STATE OF CONNECTICUT,
Supreme Court of Errors, ss:

Let the writ of error issue upon the execution of a bond by Edgar G. Mondou, in the sum of Two Hundred Dollars; said bond when approved to act as a supersedeas.

Dated August 16, 1909.

SIMEON E. BALDWIN,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

[Endorsed:] Supreme Court of Errors, Second Judicial District. Edgar G. Mondou vs. The New York, New Haven & Hartford R. R. Co. Plaintiff's Petition for Allowance of Writ of Error. Filed this 20th day of August, 1909. Geo. E. Parsons, Clerk of Supreme Court of Errors, Second Judicial District.

21 Copy.

Supreme Court of the United States.

No. —.

EDGAR G. MONDOU, Plaintiff in Error,
vs.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD —,
Defendant in Error.

Bond.

Know all men by these presents, That we, Edgar G. Mondou, of Norwich, Connecticut, as principal, and Charles H. Brown and Robert W. Perkins both of said Norwich, as sureties are held and firmly bound unto the New York, New Haven and Hartford Railroad Company, a legal corporation of New Haven, Connecticut, in the sum of Two Hundred Dollars, to be paid to the said obligee, to which payment, well and truly made, we bind ourselves jointly and severally firmly by these presents.

Signed with our seals, and dated this 10th day of August 1909.

Whereas, the above named plaintiff in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of Errors of the State of Connecticut,

Now, therefore, The condition of this obligation is such, that if the above named plaintiff in error shall prosecute his said writ of

error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

EDGAR G. MONDOU. [L. S.]
CHAS. H. BROWN. [L. S.]
ROBERT W. PERKINS. [L. S.]

Signed, sealed and delivered in presence of
ALLYN L. BROWN.

22 STATE OF CONNECTICUT,
New London County:

NORWICH, *August* —, 1909.

Charles H. Brown and Robert W. Perkins being each duly sworn, on oath depose and say; we are each of lawful age and are citizens of the State of Connecticut, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Two Hundred Dollars over and above all debts, liabilities and exemptions.

CHAS. H. BROWN.
ROBERT W. PERKINS.

Subscribed and sworn to before me this 10th day of August, 1909.
ALLYN L. BROWN,
Notary Public.

The above bond is approved August 16th, 1909.
SIMEON E. BALDWIN,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

[Endorsed:] Supreme Court of the United States. Edgar G. Mondou, Plaintiff in Error, vs. The New York, New Haven & Hartford R. R. Co. Copy of Bond on Writ of Error. Filed this 20th day of August, 1909. Geo. E. Parsons, Clerk of Supreme Court of Errors. Second Judicial District.

23 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of Errors of the State of Connecticut:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said Supreme Court of Errors of the State of Connecticut, before you, at the April term, 1909, in the Second Judicial District, New London County, thereof, between Edgar G. Mondou of Norwich, Connecticut, a citizen of the United States, appellant, versus The New York, New Haven and Hartford Railroad Company, a legal corporation located in New Haven, Connecticut, appellee, a manifest error has happened, to the great damage of the said appellant, Edgar G. Mondou, as by his complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C., and filed in the office of Clerk of the United States Supreme Court on the 15th day of September A. D. 1909, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 16th day of August 1909.

Done in the City of Hartford with the seal of the Circuit Court of the United States for the District of Connecticut, attached.

[Seal of Circuit Court, Connecticut.]

R. F. CARROLL,
Deputy Clerk Circuit Court United States, District of Connecticut.

24 Allowed August 16, 1909.

SIMEON E. BALDWIN,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

[Endorsed:] No. —. Supreme Court of the United States. Edgar G. Mondou, Plaintiff in Error, vs. The New York, New Haven & Hartford R. R. Co., Defendant in Error. Writ of Error. Donald G. Perkins, Norwich, Conn., Counsel for Plaintiff. Filed this 20th day of August, 1909. Geo. E. Parsons, Clerk of the Supreme Court of Errors, Second Judicial District.

25 The original of the foregoing supersedeas bond was lodged with the clerk of the Supreme Court of Errors of the State of Connecticut, Second Jucicial District, on Aug. 20th 1909, and the following endorsement made thereon; "Bond. Filed, this 20th day of August 1909. George E. Parsons, Clerk of Supreme Court of Errors of Connecticut, Second Judicial District."

The original of the foregoing writ of error was lodged with the clerk of the Supreme Court of Errors of the State of Connecticut, Second Judicial District, on August 20th 1909, and also at the same time and place a copy thereof for the defendant, the New York, New Haven and Hartford Railroad Company. The following endorsement was made upon said copy: "Writ of Error received and filed this 20th day of August 1909. George E. Parsons, Clerk of Supreme Court of Errors of Connecticut, Second Judicial District."

26 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the New York, New Haven and Hartford Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., on the 15th day of September A. D. 1909, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of Errors of the State of Connecticut, wherein Edgar G. Mondou is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of Errors of the State of Connecticut, this 16th day of August 1909.

SIMEON E. BALDWIN,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

NEW HAVEN, CONN., *Aug. 16th*, 1909.

We hereby acknowledge due service of the above citation.

NEW YORK, NEW HAVEN & HARTFORD R. R. CO.,
By BRANDEGEE, KENEALY & BRENNAN,
Its Attorneys.

[Endorsed:] Supreme Court of the United States. Edgar G. Mondou, Plaintiff in Error, vs. The New York, New Haven & Hartford R. R. Co., Defendant in Error. Citation on Writ of Error. Donald G. Perkins, Norwich, Conn., Counsel for Plaintiff in Error. Filed this 20th day of August, 1909. Geo. E. Parsons, Clerk of Supreme Court of Errors, Second Judicial District.

27 UNITED STATES OF AMERICA,
Supreme Court of Errors of Connecticut, Second Judicial District, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly authenticated transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Errors of Connecticut, Second Judicial District, in the City of Norwich, this 20th day of August, 1909.

[Seal Supreme Court of Errors, Conn.]

GEORGE E. PARSONS,
Clerk of Supreme Court of Errors of Connecticut, Second Judicial District.

Endorsed on cover: File No. 21,805. Connecticut Supreme Court of Errors. Term No. 579. Edgar G. Mondou, plaintiff in error, vs. The New York, New Haven & Hartford Railroad Company. Filed August 27th, 1909. File No. 21,805.

Office Supreme Court, U. S.
FILED.
SEP 20 1910
JAMES H. McKENNEY,

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910

No. [redacted] 120

EDGAR G. MONDOU, PLAINTIFF IN ERROR,

vs.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
DEFENDANT IN ERROR.

MOTION TO ADVANCE.

EDGAR G. MONDOU, Plaintiff in Error,

vs.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Defendant in Error.

Motion to Advance.

Comes now the above named Plaintiff in Error herein by Donald G. Perkins, his counsel, appearing in that behalf and moves the Court to advance the above entitled cause on the docket for hearing, argument and decision.

This case is a writ of error from a decision of the Supreme Court of Errors of the State of Connecticut affirming and finding no error in a decision of the Superior Court sustaining a demurrer to the plaintiff's complaint based on the Act of Congress Relating to Liability of Common Carriers of Railroad to their Employes in certain cases, approved April 22, 1908, on the ground that said Act of Congress was unconstitutional and void, and the matter involved in this writ of error is the construction and constitutionality of said Act of Congress.

The reasons for the advancement of said cause are that many causes of action have already arisen and are constantly arising under said Act of Congress and many cases are now pending in various jurisdictions based upon said Act of Congress and all depending on the construction and constitutionality of the same and the matter is one of great public interest and importance which requires a speedy settlement and determination of the construction and constitutionality of said Act of Congress, and causes involving the same question

have already been advanced by this Honorable Court, as your petitioner understands, for argument on October 11, 1910.

Respectfully submitted,

EDGAR G. MONDOU,

By DONALD G. PERKINS,

His Attorney.

STATE OF CONNECTICUT, *New Haven County, ss:*

NEW HAVEN, *September* 10, 1910.

The Defendant in Error in the above entitled action hereby acknowledges having received a copy and due and lawful notice of the foregoing Motion to Advance and waives any other or further notice and stipulates and agrees that said motion to advance may be filed, presented and heard on October 11, 1910, with the permission of the Court at the opening of Court and that said motion may be granted and said case advanced for argument on said October 11, 1910, with the case of Northern Pacific Railway Company against Babcock, Administratrix, Number 383, already advanced for argument at said time.

THE NEW YORK, NEW HAVEN &
HARTFORD R. R. CO.,

By GEORGE D. WATROUS,

Its Attorney.

12

Office Supreme Court, U. S.
FILED.
NOV 14 1910
JAMES H. McKENNEY,

Supreme Court of the United States

OCTOBER TERM, [redacted]. 1910

No. [redacted].120

EDGAR G. MONDOU,
Plaintiff in Error

vs.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
Defendant in Error.

In Error to the Supreme Court of Errors of the State of Connecticut.

BRIEF OF PLAINTIFF IN ERROR.

D. G. PERKINS, Counsel.

STATEMENT OF CASE.

Plaintiff in Error brought his action to the Superior Court of the State of Connecticut claiming $25,000 damages for personal injuries as relief solely under the Act of Congress entitled An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases, approved April 22, 1908.

The Superior Court sustained defendant's demurrer to plaintiff's claim for relief under this Act of Congress, on the ground that it is unconstitutional.

Upon plaintiff's appeal to the Supreme Court of Errors of Connecticut, that Court found no error in the judgment of the Superior Court.

The opinion in this case, 82 Conn., 373, does not contain the reasons for the judgment but refers for the grounds to the opinion in Hoxie, Admr., vs. N. Y., N. H. & H. R. R. Co., 82 Conn., 352.

This case differs from the Hoxie case in that, Hoxie was injured in a foreign state while the plaintiff, a citizen of Connecticut, was injured in Connecticut.

Plaintiff now brings the case by writ of error before this Court on the following

ASSIGNMENT OF ERRORS.

Said Court erred in holding and deciding,—

First. That under the above described Act of Congress the Superior Court of the State of Connecticut had no jurisdiction of the above described action and complaint of the

plaintiff based upon said Act of Congress and in ruling and holding for said reasons that said complaint was insufficient and that there was no error in the decision of said Superior Court in sustaining said demurrer.

Second. That under the above described Act of Congress the Superior Court of the State of Connecticut could not be required by the Congress of the United States to take jurisdiction of said action of the plaintiff based upon said Act of Congress and that said Act of Congress was for said reason unconstitutional and void and that there was no error in the decision of said Superior Court in sustaining said demurrer.

Third. That the said Act of Congress was unconstitutional and void as exceeding the power of Congress in regulating commerce, and that the plaintiff's complaint based thereon was insufficient, and that there was no error in the decision of the Superior Court in sustaining said demurrer.

BRIEF OF ARGUMENT.

We take up first the conclusion of the Connecticut Supreme Court that the Act of Congress was unconstitutional because it exceeded the power of Congress to regulate interstate commerce.

The Act of 1906 was held unconstitutional by this Court because it could not by construction write into the act words to make it read, "Any employe *when engaged in interstate commerce*," which express words of limitation if contained in the act, it was conceded would have rendered it constitutional.

Congress in passing the Act of 1908 adopted this suggestion and used express words of limitation to meet the views of the Court.

The present Act applies only to railroad carriers *while engaging in interstate commerce* and creates a liability in favor of employees injured *while so employed in such commerce* as follows:

1. A liability for injuries resulting from negligence of the carrier's officers, agents, or employees, thus abrogating the fellow-servant rule under the common law.

2. Contributory negligence is not to be a bar but to be used to diminish damages in proportion to the amount of negligence attributable to the employee.

3. Risks of the employment are not assumed when the carrier's violation of safety appliance statutes contributes to the injury.

4. The carrier cannot exempt itself by contract, rule or device, from the liability imposed.

So far as the substantive right goes the Act of 1908 does not differ from the Act of 1906 and was within the power of Congress under the decision of this Court, and it is unnecessary to cite the cases and repeat the argument there considered.

Thornton, Employers' Liability & Safety Appliance Acts, §7, p. 10, et seq.
Employers' Liability Cases, 207 U. S., 463.

This decision was recognized as decisive of the main points in Adair vs. U. S., 208 U. S., 178, in the following language:

> "In that case (Employers' Liability Cases, 207 U. S., 463), the Court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employees in such interstate commerce, in cases of personal injuries received by employees while actually engaged in such commerce. The de-

> cision on this point was placed on the ground that a rule of that character would have direct reference to the conduct of interstate commerce, and would therefore be within the competency of Congress to establish for commerce among the states, but not as to commerce completely internal to a state."

The points in which the Act of 1908 differs from that of 1906, as to contributory negligence, the limitation of the action, that common carrier shall include receiver, are not matters affecting the constitutional power of Congress but are matters of degree merely and incidental and necessarily included in the power to create the original liability.

The power to create the liability necessarily includes the power to change any and all rules in existence in relation to the liability of master to servant at common law or under State statutes.

Even the rules of the common law limited the power of the carrier to free itself entirely by contract from liability for its negligence in the carriage of passengers and freight, and the legislative power of Congress, assuming the matter is within its sphere, includes the right to change these rules of the common law and create a new and different rule.

> Railroad Co. vs. Lockwood, 17 Wall, 357.
> Railroad Co. vs. Stevens, 95 U. S., 655.
> Liverpool S. Co. vs. Phoenix Ins. Co., 129 U. S., 397.

But the constitutionality of this fifth section of the Act is not involved in this case, and it is separable entirely from the liability created which stands unaffected by any constitutional objections which may exist to this fifth section.

All the arguments as to the confusion and evil results likely to be caused by this law, have no bearing upon the question

as to the constitutional power of Congress to pass it, but relate merely to the wisdom of the legislative act.

Employers' Liability Cases, 207 U. S., 492.
U. S. vs. D. H. R. R. Co., 213 U. S., 405.

Nor is there any violation of constitutional privilege, because the Act applies to railroad interstate carriers alone, for it bears alike upon all in that class and it was a matter for Congress alone to decide whether it should apply to all carriers, carriers by water or carriers by railroad, as Congress saw the need for the regulation of commerce.

Missouri Pacific vs. Mackey, 127 U. S., 205.

Such a regulation of commerce might well be necessary as to the large class of carriers by railroad and not as to other carriers, exactly as the Safety Appliance Act is necessary as to one class and not adapted to others.

The present Act does not go beyond the principles decided in the above cases to be within the power of Congress, and the complaint based upon this Act should have been held sufficient.

There is no foundation for the claim that the present Act is not limited solely to the regulation of interstate commerce because under it the carrier may be liable for the negligence of an intrastate employe.

The carrier is liable only *while engaging in interstate commerce* and to a servant *while employed in such commerce.*

The master is liable for the negligent act of the servant only when the servant is acting within the scope of his employment; and when he is so acting, his act is in contemplation of law the act of the master.

The negligence complained of must be the proximate cause of the injury, and if it is, then the actor is so connected

The original act is silent on the question of jurisdiction and simply creates a right leaving the party to enforce it in any Court of competent jurisdiction.

There is no express provision in the act excluding the jurisdiction of the State Courts, nor is there any strong implication against such jurisdiction, nor any incompatibility to prevent its exercise.

It was evidently the intent of Congress that the State Court should have a concurrent jurisdiction, for unless this is so a party having a claim of less than $2,000 would be without a remedy, for the Circuit Court of the United States has no jurisdiction where the damages claimed are less than $2,000.

And this argument is not met by the suggestion in the opinion of the Connecticut Supreme Court that a plaintiff may bring all cases however small in fact within the jurisdiction of the Circuit Court by claiming $2,000 or more damages, because under Act, Mar. 3, 1875, C. 137 §5, 18 Stat. 472, the Circuit Court is bound to dismiss such a suit if it does not

> "Really and substantially involve a dispute within the jurisdiction of the Court."

And also under §969 U. S. Stat., if a plaintiff recovers less than $500 he can get no costs and might be made to pay costs.

Under the Act of Mar. 3, 1875, C. 137, §1, 18 Stat. 470, as amended in 1887 and 1888, 24 Stat. 552 and 25 Stat. 443,

> "The Circuit Courts of the United States shall have original cognizance, *concurrent with the Courts of the several states*, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds exclusive of interest and costs, the sum or value of two thousand dollars and arising under the Constitution or laws of the United States."

The power to regulate interstate commerce is one of the powers which the State surrendered to the United States, and assuming that the Act in question is constitutional and within the power of Congress to regulate interstate commerce, then the power of Congress is supreme and paramount to that of the State and supersedes the law and policy of the State of Connecticut on the same subject, so that the State has no law and no policy on this subject except the Act of Congress.

Sinnott vs. Davenport et al., 22 How., 242.
Gulf, etc., vs. Hefley, 158 U. S. 98, 103.
Atl. etc., Tel. Co. vs. Phila., 190, U. S. 160, 162.
Miss. R. R. Comrs. vs. Ill. Central, 203, U. S. 335.
El Paso, etc., vs. Gutierrez, Admr., 215, U. S. 87.

Under Art. VI., U. S. Cons.,

> "This constitution and the laws of the United States which shall be made in pursuance thereof * * * * shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

And the oath of office of the Judges of the Connecticut Supreme Court requires them to support this Constitution.

When we take into consideration this provision of the Constitution and the fact that the Act of Congress is supreme and the only law binding upon Connecticut on this subject, the fallacy of the reasoning by the Connecticut Supreme Court that it cannot entertain jurisdiction of this action because contrary to the public policy and laws of Connecticut, and because it would be enforcing what it deems injustice instead of justice, is apparent.

There is no incompatibility in the exercise of jurisdiction by the State Court based upon the fact that the right created by the Act is one not allowed by the law of the state, or is contrary to the laws and policy of the state, because the state law is superseded and the state can have no law or policy on the subject contrary to the Act.

Even in enforcing transitory actions either in contract or tort arising under the laws of a foreign state, which is done as an act of comity between foreign states, the fact that the foreign law is different is not sufficient to prevent jurisdiction.

The great and substantial difference noted by the Connecticut Supreme Court, which in its opinion precludes jurisdiction, is that the Act allows recovery for damages caused by the negligence of a fellow servant while the Connecticut law does not, but this very difference has been held not sufficient to prevent the courts of one state from enforcing the laws of another, merely from comity.

In Walsh vs. N. Y. & N. E. R. R. Co., 160 Mass., 571 the courts of Massachusetts enforced a cause of action based on the Connecticut law of vice principal when in Massachusetts the fellow servant rule would have been a bar to the action.

In No. Pac. vs. Babcock, 154 U. S., 197, this Court in making a similar decision said:

> "The question which those assignments of error present is, was the amount of damage to be controlled by the law of the place of employment and where the accident occurred, or by the law of the forum in which the suit was pending? In the case of Herrick v. Minneapolis & St. L. R. Co., reported in 31 Minn. 11, 47 Am. Rep. 771, which involved the question of whether the courts of Minnesota would enforce and apply to a suit in that state for a cause of action originating in Iowa a law of the

state of Iowa making railroad corporations liable for damages sustained by its employes *in consequence of the neglect of fellow servants*, the court said:

"The statute of another state has, of course, no extra-territorial force, but rights acquired under it will always, in comity, be enforced if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And we think the principle is the same, whether the right of action be ex contractu or ex delicto.

"The defendant admits the general rule to be as thus stated, but contends that as to the statutory actions like the present, it is subject to the qualifications that, to sustain the action, the law of the forum and the law of the place in holding that the act done gives a right of action. We admit that some text-writers—notably, Rorer on Interstate Law—seem to lay down this rule, but the authorities cited generally fail to sustain it.

* * * * * *

"But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the lex loci contractus and the lex fori are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural

justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens."

"This opinion of the Supreme Court of Minnesota is in accord with the rule announced by Chief Justice Marshall in The Antelope, 23 U. S., 10 Wheat 66 (6; 268). In referring to that case in Texas & R. R. Co. v. Cox, 145 U. S. 593 (36; 829), the Court said: 'The courts of no country execute the penal laws of another. But we have held that that rule cannot be invoked as applied to a statute of this kind, which merely authorizes a civil action to recover damages for a civil injury.' The rule thus enunciated had been adopted in previous cases, and has since been approved by this court. Smith v. Condry, 42 U. S., 1 How. 28 (11; 35); The China v. Walsh, 74 U. S. 7 Wall. 53, 64 (19; 67, 71); Dennick v. Central R. Co. of N. J. Co. v. Dyer ('The Scotland'), 105 U. S. 24, 29 (26; 1001, 1003); Huntington v. Attrill, 146 U. S. 670 (36; 1128). Indeed in Texas & P. R. Co. v. Cox, supra, Mr. Chief Justice Fuller, speaking for the Court, said: 'The question, however, is one of general law, and we regard it as settled in Dennick v. Central R. Co. of N. J.'"

Another objection noted by the Connecticut Supreme Court was the rule of distribution of death damages fixed by the Act, which differs slightly from the Connecticut law but such a difference has been held by this Court not sufficient to pre-

vent the courts of one state from enforcing a cause of action under the statutes of another.

In Dennick vs. R. R. Co., 103 U. S., 18, 29, this Court said:

> "It is scarcely contended that the Act belongs to the class of criminal laws which can only be enforced by the courts of the state where the offense was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury.
>
> "It is, indeed, a right dependent solely on the statute of the State, but when the act is done for which the law says the person shall be liable and the action, by which the remedy is to be enforced, is a personal and not a real action, and is of that character which the law recognized as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here
>
> "It is difficult to understand how the nature of the remedy or the jurisdiction of the courts to enforce it is in any manner dependent on the question whether it is a statutory right or a common law right.
>
> "Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."
>
> "The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial, and the local court in New York, and the Circuit Court of the United States for the Northern District, were competent to try such a case

when the parties were properly before it. See Mostyn v. Fabrigas, 1 Cowp., 161; Rafael v. Verelst 2 W. Bl., 983, 1055; McKenna v. Fisk, 1 How., 241. We do not see how the fact that it was a statutory right can vary the principle. If the defendant was legally liable in New Jersey he could not escape that liability by going to New York. If the liability to pay money was fixed by the law of the state where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her Civil Code. Can these rights be enforced or the wrongs of her citizens be redressed in no other state of the Union? The contrary has been held in many cases. See, Ex parte Van Riper, 20 Wend., 614; Lowry v. Inman, 46 N. Y., 119; Pickering b. Fisk, 6 Vt., 102; R. R. Co. v. Sprayberry, 8 Bax. (Tenn.) 341; R. R. Co. v. Miller, 19 Mich., 305."

* * * * *

"If, then, the defendant was liable to be sued in the courts of the state of New York on this cause of action, and the suit could only be brought by the personal representative of the deceased, and if the plaintiff is the personal representative of the deceased, whom the courts of that state are bound to recognize, or what principle can her right to maintain the action be denied?

"So far as any reason has been given for such a proposition it seems to be this: that the foreign administrator is not responsible to the courts of New Jersey, and

cannot be compelled to distribute the amount received in accordance with the New Jersey statute.

"But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, *so any court having control of the administratrix can compel distribution of the amount received in the manner prescribed by that statute.*

"Again, it is said that, by virtue of her appointment in New York, the administratrix can only act upon or administer that which was of the estate of the deceased in his lifetime. There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees, and is not subject to sale or distribution in any other mode, as the amount set apart in most of the states to the family, devises of specific property to individuals, all of which can be enforced in the courts; and no reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and the duty of distributing under that law. There can be no doubt that an administrator invested with the apparent right to receive or recover by suit property or money, may be compelled to deliver or pay over, to some one who establishes a better right, or that what was so recovered was held in trust for some one not claiming under the will or under the administrator. And so here. The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. *It would be a reproach to the laws of New York to say that when the money recovered in such*

an action as this came to the hands of the administratrix, her courts could not compel distribution as the law directs."

It is as easy for the State Courts to enforce a distribution of damages in the manner provided by this Act as it is for them to cause a distribution in all the various ways provided in wills contrary to the statutory rule.

Another objection thought by the Connecticut Supreme Court to be serious, was that as the act defined carrier to include a receiver appointed by a State Court, it authorized a suit against such receiver without regard to permission first obtained from the State Court.

There is no force whatever to this objection for the following reasons:

A suit brought against a receiver without consent first obtained from the Court appointing him is good and failure to get consent simply involves a contempt of Court by the plaintiff.

As a matter of practice consent was always given and it was simply a matter of form first to apply for it.

A State Court would have no authority to authorize a receiver to engage in interstate commerce, contrary to United States laws, and if he did engage in it he would be subject to the laws of the United States governing it, such as the rate law, Safety Appliance Acts, etc.

An analagous liability of a receiver is that which exists at common law, to a suit of trover or trespass without consent first obtained, when he converts property not covered by his appointment and which he was not authorized by the Court to take possession of; it is the same liability a sheriff is under if he attaches property not authorized by his writ.

Officers and even judges appointed by a State, may be punished for a violation of a United States statute.

But how much stronger is the argument that there is no objection to the statute because under it a receiver appointed by a State Court may be sued without going through the form of first getting the consent of the Court.

Ex parte Siebold, 100 U. S., 371.

If the receiver engages in interstate commerce beyond the authority conferred by the State Court, he does it of course subject to the laws of the United States and consent would not have to be obtained before bringing suit any more than it would if the receiver had taken possession of property not authorized by his appointment.

There is no incompatibility or difficulty as to procedure in the State Court, because the act provides in relation to contributory negligence that the damages shall be diminished by the jury because in the first place, the Connecticut law requires a jury at the request of either party to assess damages in defaulted actions of tort, and, second, in cases where the Court without a jury assesses damages, the words of the act by construction will be held to include the judge while performing the duty usually done by a jury.

So also as to the provision for a set off of insurance benefits received. The Courts are not going to stickle over the word "set-off" but will consider the right involved which is so attached to and connected with the cause of action created that it would be in the nature of a counter-claim and so admitted under strict Connecticut law to be availed of by the defendant to reduce the plaintiff's claim (Conn. Gen. Stat., 1902, §612), or it might be treated as a fact made admissible by the statute to reduce or mitigate the damages. The courts will adapt a remedy to this right of the defendant re-

garding the substance of the right and not the mere form of procedure.

Even if the plaintiff's right of action were to be treated, as arising under the laws of a foreign state, the Connecticut Court could not deny him a remedy from mere whim or because the judges did not like the law, but it could only be done on established principles of law governing all cases, that to grant him his remedy would be against the public policy or interests of the state, not simply against the interest of the defendant, and the following cases show that the conclusion of the Court that it could not entertain jurisdiction was unsound and not in accord with established principles.

Dennick vs. R. R. Co., 103 U. S., 18.
No. Pac. vs. Mackey, 127 U. S., 205.
Huntington vs. Attrell, 146 U. S., 657.
No. Pac. vs. Babcock, 154 U. S., 190.
Ward vs. Jenkins, 10 Metc., 588.
Higgins vs. R. R. Co., 155 Mass., 176.
Walsh vs. R. R. Co., 160 Mass., 571.
King vs. Sarria, 69 N. Y., 31.
Leonard, Admr., vs. Columbia & Co., 84 N. Y., 48.
Stoeckman vs. T. H. & R. R. Co., 15 Mo. App., 503.
C. & O. R. R. Co. vs. Am. Ex. Bank, 92 Va., 154.

But the plaintiff's case is much stronger than if he were suing under a foreign law because the whole foundation of the comity rule as to transitory actions is the principle that the law of a state has no extraterritorial force and therefore can be enforced not of right but only as an act of comity, while this plaintiff is a citizen of Connecticut and sues in the courts of his own state on a cause of action arising in the state under the Act of Congress, which is the Supreme law of Connecticut, and governs the public policy of the state on that point.

In Blythe vs. Hinckley, 173 U. S., 508, this Court said:

> "* * * for the constitution, laws and treaties of the United States are as much a part of the laws of every state as its own local laws and constitution, etc."

In Claflin vs. Houseman, 93 U. S., 136, this Court said:

> "Other analogous cases have occurred, and the same result has been reached; the general principle being that, where jurisdiction may be conferred on the United States Courts, it may be made exclusive where not so by the constitution itself; but, if exclusive jurisdiction be neither express nor implied, the State Courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it. Thus, the United States itself may sue in the State Courts, and often does so. If this may be done, surely, on the principle that the greater includes the less, an officer or corporation created by United States authority may be enabled to sue in such courts. Nothing in the constitution, fairly considered, forbids it.
>
> "The general question, whether State Courts can exercise concurrent jurisdiction with the Federal Courts in cases arising under the constitution, laws and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises; sometimes with a leaning in one direction and sometimes in the other; but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case.
>
> "When we consider the structure and true relations of the Federal and State Governments, there is really

no just foundation for excluding the State Courts from all such jurisdiction.

"The laws of the United States are laws of the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties having concurrent jurisdiction in the state; concurrent as to place and persons, though distinct as to subject. *Legal or equitable rights, acquired under either system of laws may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction.* Thus, a legal or equitable right acquired under state law, may be prosecuted in the State Courts, and also, if the parties reside in different states, in the Federal Courts. *So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States Courts, or in the State Courts, competent to decide rights of the like character and class;* subject, however to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal Courts exclusive jurisdiction. See remarks of Mr. Justice Field, in The Moses Taylor, 4 Wall, 429 (71 U. S., XVIII, 401), and Story, J., in Martin vs. Hunter, 1 Wheat., 334; and Mr. Justice Swayne, in Ex parte McNeil, 13 Wall., 236 (80 U. S., XX, 624). This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an Act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided

otherwise by some Act of Congress, by a proper action in a State Court. *The fact that a State Court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws.* The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the State and Federal Governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States Government, which has been the occasion of disastrous evils to the country.

"It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of Ableman v. Booth, 21 How., 506 (62 U. S., XVI, 169); and hence the State Courts have no power to revise the action of the Federal Courts, nor the Federal the State, *except where the Federal Constitution or laws are involved.* But this is no reason why the State Courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

The plaintiff then, claimed a right of action under the law of the United States which under Art. VI of the U. S. Cons. was the Supreme law of Connecticut and bound the Judges of the

Connecticut Supreme Court notwithstanding the constitution or laws of Connecticut (if the Judges could find any) to the contrary.

This is a right under United States law just as much as is a discharge in bankruptcy granted by a Court of the United States under the United States bankrupt law and such a discharge is valid in the Courts of all the States.

Hanover Nat. Bank vs. Moyses, 186 U. S., 181.

There is no difference in principle between the court's refusing to entertain jurisdiction of a right of action by a plaintiff under a law of the United States, and refusing to entertain jurisdiction of a right to the defendant of the defence of a discharge in bankruptcy under a law of the United States.

Connecticut as a state cannot grant a discharge of a contract arising under a foreign law and it is against the law or policy of the state to grant a discharge, but we doubt if the Connecticut Supreme Court would refuse to enforce a discharge in bankruptcy, properly pleaded, because it was granted under a law of the United States stated by the Court to be not binding on the state and contrary to its public policy.

The denial by a State Court to entertain the defense of a discharge in bankruptcy by a Court of the United States under the United States bankrupt law, would present a federal question reviewable by the Supreme Court of the United States.

Strader, et al., vs. Baldwin, 9 How., 261.

The denial by a State Court of a defense under a territorial statute presents such a federal question.

El Paso, etc., vs. Gutierrez, 215 U. S., 87.

In Schlemmer vs. Buffalo, etc., R. R., 205 U. S., 1, 11, a writ of error to the State Court of Pennsylvania, this Court held a federal question involved because the State Court, while de-

ciding against the plaintiff solely on the fact of his contributory negligence established by the record, did not give him the benefit of the provisions of the Safety Appliance Act on which the suit was brought, and notwithstanding the State Court suggested a query whether an action on the Safety Appliance Act could be maintained in a State Court, this court reversed the judgment because of the erroneous decision as to plaintiff's rights secured him by the United States statute.

The Connecticut Supreme Court denied jurisdiction of the plaintiff's right of action solely because it arose under a statute of the United States, and thus deprived him of a right secured to him by the constitution and laws of the United States, and on this ground denied him a remedy and the equal protection of the laws to establish his right.

It is true as held in St. Louis, etc., vs. Taylor, 210, U. S., 285, that each state may determine the limits of the jurisdiction of its Courts, and how far it will entertain transitory actions when the cause of action arose outside the state, but that case establishes the exception that *such power is subject to the limitations of the Federal Constitution*, and is not applicable to a cause of action arising in the state under a law of the United States which is secured to the citizen by the constitution.

No such situation is presented here as in Ex parte Stephens 4 Gray, 559, where by state statute the courts had been deprived of jurisdiction to grant naturalization papers to U. S. citizens.

If the State of Connecticut were to pass a law that the Superior Court should not take jurisdiction of any civil action by a citizen claiming under this Act of Congress, we would have a different question and could test the constitutionality of such a statute.

The Connecticut Supreme Court had no power to legislate or establish the public policy of the state but its duty was to

declare the law and it was bound by the constitution and laws of the United States.

The following authorities establish the proposition that the plaintiff was entitled to maintain his action in the State Court.

Ex parte McNeil, 13 Wall, 243.
Teal vs. Felton, 12 How., 292.
Claflin vs. Houseman, 93 U. S., 136.
Charlotte Nat. Bank vs. Morgan, 132 U. S., 141, 144.
Defiance Water Co. vs. Defiance, 191 U. S., 184.
Raisler vs. Oliver, 97 Ala., 710.
Ordway vs. Central Nat. Bank, 47 Md., 245.
Schuyler Nat. Bank vs. Bollong, 24 Neb., 827.
Singer vs. Bedstead Co., 65 N. J. Eq., 293.
Cook vs. Whipple, et al., 55 N. Y., 164.
People vs. Welch, 141 N. Y., 273.
Bletz vs. Columbia Nat. Bank, 87 Pa. St., 87.
Hartley vs. U. S., 3 Hayw. (Tenn.), 45.

The following are cases in State Courts on the Safety Appliance Act:

Kansas City, etc., vs. Flippo, 138 Ala., 487.
Mobile, etc., vs. Bramberg, 141 Ala., 258.

In the case of Wilson vs. So. R. Co., 172 Fed. R., 478, a case brought under the Act of Congress, the case was remanded to the State Court, thus assuming it had jurisdiction.

If as stated by the Court in Dennick vs. R. R. Co., cited above, it would be a dangerous doctrine to establish that civil rights accruing under a State statute can be enforced in no other state but in that enacting the statute, how much more dangerous is this doctrine stated by the Connecticut Supreme Court that civil rights accruing to one of its own citizens within the state itself under an Act of Congress which under

the United States Constitution is the supreme law of Connecticut and binding upon its judges, cannot be enforced in a State Court because forsooth against the laws and policy of Connecticut.

It is respectfully submitted that the judgment of the Connecticut Supreme Court should be reversed and that a judgment be entered finding error in and reversing the judgment of the Superior Court sustaining the demurrer to the complaint.

Respectfully submitted,

DONALD G. PERKINS,

Counsel for Plaintiff.

[redacted]

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 313.

EDGAR C. MONDOU,
Plaintiff in Error,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Defendant in Error.

In error to the Supreme Court of Errors of the State of Connecticut.

BRIEF FOR DEFENDANT IN ERROR.

A.

STATEMENT OF THE CASE.

There are no facts in this case which are of especial importance for its determination. This suit was brought in a State court upon the Federal Employers' Liability Act of 1908, and the only questions raised by the Record relate generally to the obligations of a State court to enforce the provisions of that Act.

The opinion of the Supreme Court of Errors of Connecticut upon the legal issues raised by this case is not found in the Record, because another similar case was argued below together with this one, and as it happened, the opinion of the Court was rendered in the other case, which was not appealed to this Court. For the convenience of this Court, the opinion of the Court below in the Hoxie case is printed in full at the end of this brief. All of the reasoning of Chief Justice Baldwin, concurred in by the whole Court, is respectfully urged upon the attention of this Court. Much that would otherwise be said in this brief will be omitted merely because it has been better said by the learned justice who wrote that opinion.

From the opinion hereinafter printed it will be seen that the Court below held in the case now before this Court:

1. That Congress did not intend by the Act of April 22, 1908, to authorize the institution of an action under it in the Courts of the States;

2. That Congress had no power under the Constitution to make it incumbent on the State Courts to assume jurisdiction of such an action; and

3. That the Act, so far as it concerns this cause, is wholly void by reason of certain of its provisions which cannot be separated from the rest.

The first two points are discussed in a brief prepared by associate counsel, and submitted herewith. This brief therefore will be devoted only to the third conclusion as above stated.

B.

GENERAL ANALYSIS OF THE FEDERAL STATUTE.

If it is possible for counsel to aid this Court at all in the determination of this case, it seems that it may principally be by a candid preliminary examination of the apparent purposes of the Statute and of its effects in modifying or limiting the application of State laws.

I.

The Apparent Purposes of Congress.

1. *Safety.*

It is suggested that the main purpose of this Federal Statute is to promote the safety of persons and property. There is nothing in the title of the Act or on the face of the Act to indicate any such purpose. If there was really any such purpose on the part of Congress, this can only be determined by a demonstration that the natural tendency of the provisions of the Act is to promote such safety. I ask earnestly that this Court do not accept anyone's assertion as to this matter, but that it candidly and thoroughly test the reasonableness of the claims that are made to this effect.

What in truth is the general nature of the conditions causing railroad accidents? Upon a moment's reflection, it appears that some of these accidents are absolutely unforeseeable, and not due to any remediable human error. Such accidents clearly lie outside of the range of the present discussion. The accidents which are particularly affected by provisions of this Act are, in the main, the result

of human carelessness. In nearly all cases those accidents that are attributable to negligence are due to a momentary lapse of attention or reflection such as even careful men are liable to. There are very few men who are not sometimes absent-minded. The man does not live, however careful he may be by nature, who has not moments when he is not careful. There is no known way of preventing the accidents that result from momentary lapses of ordinarily careful men.

There is another class of accidents that result from the conduct of a careless, reckless or incompetent man. These accidents can be prevented by weeding the careless, the reckless and the incompetent men out of the employment, and to some extent, by reforming such men. If this legislation has any tendency to make railroad operations safer, it must be because of its tendency to cause the weeding out or the reforming of reckless, careless or incompetent men. Has it such a tendency?

The only suggestion of a possible effect of this kind is, that the heavy liabilities created by this Act may make the employer more careful in the selection of his servants. But what more inducement is needed for the exercise of such care than exists in the law as it was before this Act was passed? The railroad companies are paying such enormous sums of money every year as damages for injuries, and the pecuniary inducement to take every possible precaution to prevent accidents is already so overwhelming, that you cannot possibly make self-interest a greater motive-power. To undertake to add to it would be like inducing a man to put a 200-horse-power engine into his factory, when the 100-horse-power engine he has there now is at all times absolutely adequate.

In the second place (and to this only the cloistered student ought to be oblivious under existing conditions on the railroads of this country), the selection of the operating men for their jobs and the retention of them in service have ceased to be matters within the control of the managing officers of the railroads. The responsibility for the selection of operating men and for the assignment of their jobs has been in effect arrogated by the several great railroad orders whose members are among the very men affected favorably and preferentially by this Act. This is a matter of which every person who knows the conditions of modern railroading must be to some extent aware. It is in the newspapers. It is notorious.

Take the case of a locomotive engineer, who, of all men, ought to be careful and competent. What has his company to say about his appointment, about his retention in service, or about the particular job which he undertakes? How much power of control in these respects has the Superintendent, or the General Manager, or the President? The question need not be answered by guesswork. The locomotive firemen and the locomotive engineers of this country have notoriously forced upon the railroad companies the adoption of general contracts minutely establishing rights of employees in these matters, which effectively interfere with the possibility of any such control by managing officers as used to be exercised. Whenever a new engineer is needed, the fireman who is senior in the service of the company has a right to the job. It may be the opinion of the managing officers of the company that another man would be a more competent or a more careful engineer. As things are to-day, these officers have no power to give any effect to such a judgment.

If there is a vacancy on the engine of a fast train, where special qualities may be needed, the Superintendent may think he knows just the man to run that train regularly on time, and with least risk of accident; but he has absolutely no power to pick that man for that place. The engineers in order of seniority have the right to pick the runs they prefer. This job instead of going to such a man as the Superintendent would like to select, may go, without his power to hinder, to some engineer about whose fitness for that job he feels some doubt.

Again, there may be an engineer whom the managing officers of the company, in their capacity as good judges of men, would like to be rid of. They are practically unable to discharge him, so long as he does not actually go to the length of violating the rules of the company or manifest absolute incompetence. If they do discharge him, he has a right to a hearing, and to one or more appeals to higher officers, and to the assistance at the hearings of men who are practically (even when not nominally) representatives of the Brotherhood of Locomotive Engineers. These assistants resist his discharge, unless his violation of the company's rules or his incompetence can be established as conclusively as a crime must be in a police court. His discharge, or his transfer to a less exacting position, on the mere judgment of the officers that they could find a more competent or safer man for the position, would be at the most serious risk, if not the certainty, of a strike, which would disorganize the business of the railroad and of all the territory which it serves.

These illustrations might be paralleled to the same effect in the case of every class of men directly concerned with

the operation of the railroad, whether conductors and trainmen, switchmen and yardmen, or telegraphers.

The attention of this Court is respectfully called to a series of articles in the *Atlantic Monthly*, contributed by a railroad man named Fagan, which have recently been published in book form. Fagan is only a signalman on the Fitchburg division of the Boston and Maine Railroad, but is evidently a man of unusual native ability. His main thesis is that a large part of the most serious railroad accidents would not happen, if railroad men would cease the practice of violating the rules of the company made to secure safety of operation. Such practices would undoubtedly subject all concerned to discipline, if they were reported to the superintendent, but Mr. Fagan says, and says correctly, that railroad men will not report their fellow-employees for breaches of the rules adopted for the safety of train movements. They allow things to be done which, though convenient, are dangerous, and which, because they do not report them, cannot be discovered by the superintendent, until the negligent practice results in some accident—and perhaps an awful accident.—*Confessions of a Railroad Signalman.*

The one chief need to-day for the safer operation of railroads is a clearer appreciation by the members of the great railroad unions of the responsibilities which they have morally incurred through the exercise of their great power in collective bargaining upon the conditions of railroad operation.

The liability that the company may pay still more in damages than it has heretofore cannot be rationally expected to influence railroad superintendents to exercise

greater care, for they have inducements enough of that nature anyway. But the engineers and firemen and trainmen and yardmen and telegraphers need additional inducements to contribute by reporting breaches of rule and in other ways to make the operations of railroads safer.

Instead of affording additional inducements to care, this statute secures the operating men on railroads against feeling the full consequences of accidents caused by negligence and breach of rules on the part of their fellow employees or even by their own ill-conduct. It thus tends to lessen the force of the motives which might induce railroad employees to help more efficiently in weeding out of the service all employees who are careless, reckless or incompetent, and which might lead to their co-operation in reforming unsafe practices.

It is respectfully submitted that the more reflection is bestowed upon the present conditions of railroad operation and upon the natural effect upon these conditions of the provisions of the present Act, the less convincing will seem the suggestion that there is any natural tendency toward an increase of the safety of persons or property through the working of this Act. On the contrary, it seems that, so far as the statute tends at all to affect the operation of railroads, its tendency is in precisely the opposite direction.

2. *Social Welfare.*

The representative of the Attorney-General of the United States who appeared before the Court below to assist the plaintiff in the argument of this case, asserted it to be the main purpose of this statute to contribute to the well-being

of society by distributing the burden of injuries incident to the operation of railroads over all the members of the public who use the railroads, instead of permitting this burden to lie with crushing effect on those individual employees who happen to be the victims of the accidents inevitably occurring in the course of the operation of railroads

In the first case which arose under this Act of Congress (Fulgham v. Midland Valley R. R. Co., 167 Fed., 662) the Court similarly stated the real intent of this Act. The Court says:

> "I think this Act is in harmony with the purposes and recommendations of the President in at least two messages, and also in harmony with what is claimed is the strong trend of the public mind in nearly all civilized countries at this time. It proceeds on the theory that the railroad corporations are quasi-public corporations, and that the railroad company, in the first place, and the public in its final analysis should be insurers of the lives and persons of its employees while engaged in interstate commerce, for if the railroad companies are to be the insurers of their employees, they must in the end be reimbursed also by their customers for whom they do the carrying business, and in its last analysis their customers are simply the public. The theory of this legislation is that the public should share the misfortunes of the families of those who are injured or killed in the quasi-public business in which railroads are engaged."

The purpose of President Roosevelt in recommending this legislation, as appears from his speeches and messages, probably was what is avowedly the purpose the world over of labor legislation of various kinds, namely, a distribution over society at large of the burdens of the accidents and injuries which are necessarily incidental to modern industry.

In the rest of the world, whose example President Roosevelt held up to Congress in recommending this measure, labor legislation has ceased to take the form of legislation increasing the liability of employers as for tort. In England the recent labor legislation has taken primarily the form of a compensation act; and the last compensation act, the "Workmen's Compensation Act," covers all classes of wage earners and all classes of employers. It is not based upon any fiction of a tort of the employer. It provides for a compensation of workmen in cases of injury in the course of their employment, dependent as to amount upon the wages received, and also provides for speedy and simple methods of ascertaining the amount due under the act to any workman, thus not only securing that the workman shall get no more than the principle underlying modern labor legislation requires, namely, enough to prevent the burden of the accident from being a crushing one, but also securing that he or his family shall get this immediately while the needs are the greatest.

In Germany this labor legislation takes another form. For many years Germany has been working out, by a series of statutes, a system of obligatory insurance. Under some of this legislation the employers are required to contribute something more than one-half the cost of insurance, the State contributes a proportion, and the workingmen the rest.

Now in order that the real bearing of all this may be understood in the discussion of some of the questions here involved, it may be well to briefly indicate why, following out the principle which is said by the Circuit Court of the United States, in the case above cited, to underlie the Act now in

question, other countries have adopted more advanced methods. They have judged, in the first place, that there is no reason why the distribution of the burden of loss and injury incidental to modern industry should be limited to the cases where there is somebody's tort, but that it should cover also the cases of pure accidents. They have also adopted the view that the system should cover disability from illness, which is nobody's fault, and even the inevitable disabilities of old age.

These measures of labor legislation, although upon the surface they appear arbitrary, are supported by the same arguments by which we support measures for relief of the poor. Nothing could be more socialistic in principle than poor-law relief. It means that we take the property of those who have property, to give it to those who have none; and the only justification for this is—not the sympathy that we have for the poor, which would be no justification for anything but private charity—but the social necessity of keeping families from being submerged—from falling out of the ranks of the socially useful.

Furthermore (and this bears more directly upon this discussion), one reason for the preference in other countries of these types of legislation, namely, compensation acts and insurance acts, is that they do not, in the effort to distribute burdens, accomplish such unintended, illogical and unjust results as must necessarily follow from mere amendments of the laws of tort.

A New York court the other day, set aside a verdict of a jury because the damages awarded were only $25,000, and because the court deemed that this amount was inade-

quate. It would be easy to sympathize with that ruling if the case had been one where the person to pay the judgment was a person who was actually guilty of wrong; but, in reality, that verdict was held insufficient in a case where the amount to be paid was to be actually paid by persons who had done no wrong, and was to be paid on account of the carelessness of a well-selected and ordinarily-careful employee. A principle which renders a judgment of $25,000 inadequate against an entirely innocent person, does not seem to be defensible as a method of rationally and impartially distributing over society as a whole the burdens caused by accidents incidental to the working of social industry.

As an illustration of the working in this direction of an act like the one now under discussion, we may take the case of the President of the Southern Railway Company, who was killed through the negligence of the company's employees on one of his own trains while engaged in the business of the company and while employed in interstate commerce. It may be assumed that he was earning not less than $25,000 a year, and that his probability of business life was not less than ten years. Ought he to have, on any such theory as is the real support of legislation of this kind, $250,000 out of those who did no wrong? But under this Act there would apparently be no escape, if the law is followed, from an award to him of some great sum of money at the expense of his stockholders, who did no wrong.

The Circuit Court of the United States, in the case above cited, assumed that the burden thrown upon railroad companies by this Act is to be shifted on to the public. It has undoubtedly been argued by some economists that under

an act like the English Workmen's Compensation Act, which affects all employers and all employees, there is in the long run a tendency to shift to the consuming public the burdens primarily laid by the act upon employers. But the arguments of these economists would not apply in the case of an act like the present one, which affects only one class of employers and operates only for the benefit of certain classes of their employees. Railroad companies in any event will naturally establish rates and arrange their business so as to earn as much money as they can consistently with the performance of their duties. Their earning ability cannot well be increased through any natural effect of a law that merely causes them to pay out more money in damages. Such a law can have no more effect in that direction than any one of the many causes which may operate on any railroad to increase the expenses of its operation.

II.

The Effect of the Federal Statute on the Law and the Legislative Policy of the States.

1. *The Law of Torts.*

It is a part of the general province of government of each State of the American Union to determine, in accordance with the sense of natural justice prevailing in such State, what personal conduct shall be treated by such State as constituting a delict or tort for the pecuniary consequence of which the wrongdoer shall be made to answer judicially to the person wronged. This Federal Statute (if it is constitutional and binding on the courts of all the States) shuts off a part of this province of government, as henceforth a field for Congressional legislation only.

(a) *Respondeat superior.*

English and American lawyers are used to the doctrine of *respondeat superior*—so used to it that they do not always remember upon what a narrow ethical basis this doctrine is founded. It is a well known fact of social psychology that a rule or custom to which any tribe or people is accustomed, generally meets with moral approval; and that many things which are shocking to the moral sense of another tribe or people are approved by the men of such tribe because they have always been used to them.

A simple illustration will test the ethical foundation of the rule *respondeat superior*: In many farming districts it is usual for farmers when not pressed with work upon their own farms to hire out for day's wages to other farmers who are so pressed. Smith one day may work for Meyer, and the next day Farmer Meyer may work for Farmer Smith. Now suppose while Farmer Smith is for day's wages carting Farmer Meyer's wheat to market, Farmer Smith runs over a child. His negligence is clear—it is a wrong; and from that wrong, according to principles of natural justice, there flow consequences to the wrongdoer in his relations to the person wronged. But Farmer Meyer, for whom Farmer Smith was that day working, has done no wrong. He has employed a competent man, has furnished him a good horse, safe to drive, and a proper wagon, and has sent him on a proper errand. Yet according to the rule of *respondeat superior* he is liable for the consequences of a wrong in which he had no part, and which is in no just sense attributable to him. It may be that he will be liable in damages for more than the value of his farm for an act—for a wrong, of which he was absolutely innocent.

The rule of *respondeat superior* as applied in the English and American law of torts has no continuous antiquity. Before the time of Lord Holt the cases applied a very different rule, based on the existence of a particular command of the master, which is approximately stated in the maxim: "*Qui facit per alium facit per se.*" All the earlier cases are carefully collected by Prof. Wigmore in the *Harvard Law Review*, Vol. VII, pp. 384–391. These cases seem to make it clear that prior to 1700 this doctrine of *respondeat superior* was not established in the English law.

The Latin form of the phrase makes people think that the doctrine of *respondeat superior* was a part of the Roman law. But there was no such doctrine in the Roman law. The maxim which expressed the rule of the Roman law was this: "*Culpa tenet suos auctores tantum.*" The wrong renders liable its authors only.

There is no such general rule as ours in the law of Austria or of the German Empire. In the Imperial Civil Code of Germany the rule is that a master is liable for the wrongs of his servants, only when he is unable to show that he himself was free from fault either in the employment of the servant or in the materials which he furnished him or in superintendence of the work.

> "A person who employs another to do any work is bound to compensate for any damage which the other unlawfully causes to a third party in the performance of his work. The duty to compensate does not arise, if the employer has exercised ordinary care in the selection of the employees, and where he has to supply appliances or implements or to superintend the work, has also exercised ordinary care as regards such supply or superintendence, or if the damage would have arisen, notwithstanding the exercise of such care."
>
> § 831 German Imperial Civil Code.

This rule "*respondeat superior*," has given great difficulty to philosophical writers on jurisprudence and to judges. In the case of Bartons Hill Coal Co. v. Reid, 3 Mac Queen, 266, 283, 284, Lord Cranmouth justifies the rule on the ground of the solidarity of employer and employees in their relations to independent third parties. The independent third party knows them as a whole, and the master must answer for the whole. But there is no such solidarity except by virtue of a legal fiction. Such a fiction seems to have been natural to primitive men, and is often found in primitive jurisprudence in the form of a liability of a community for the act of one of its members. But such a rule is not founded on natural justice, since it makes men who are entirely innocent answerable for the wrongs of others; and progressive jurisprudence has worked away from fictions of that sort.

Another juristic explanation of the rule "*respondeat superior*" has been based on the suggested principle that a man acts at his peril, and must be responsible for all consequences of his acts. An innocent bystander is injured by the carelessness of a workman building a house. To be sure, the workman's master is also innocent. But the suggestion is that as between two entirely innocent parties, the one may be made to bear the burden of an injury, who set in motion the agencies that caused the injury. It needs only to be pointed out that the principle thus suggested as the basis of the rule "*respondeat superior*" has so little foundation in natural justice, that it has never been generally applied in any system of law.

The truth probably is that the rule of *respondeat superior* has developed in English and American law in response to

an unanalyzed feeling of sympathy for persons injured, as against others somehow concerned who could afford to compensate for the injury; but the question is now raised in many communities whether by the application of principles of public policy having a broader ethical basis it is not possible to prevent the pecuniary burden of those accidents which arise inevitably out of modern industrial conditions from resting wholly, and often with crushing effect, on the particular persons who happen to be injured, or on their families, and at the same time to remedy some illogical and unjust results of the rule of *respondeat superior*.

On the one hand it is felt to be very unsatisfactory that all relief for the consequences of industrial accidents should be refused, unless there is some negligence involved, and on the other hand it is felt that it surpasses all bounds of justice that employers, who are themselves absolutely free from negligence or any wrong-doing, should pay such great sums as have been lately awarded against them by juries on account of wrongs committed by others, simply because those others have been with all due care employed by them.

This Federal Employers' Liability Act, if it is binding on the Courts of every State, may, with the progress of thought in some communities, compel the people of those communities to continue in certain cases to hold their citizens guilty of a wrong, when, according to sounder conceptions of natural justice, they believe these citizens guiltless of wrong.

(*b.*) *Fellow Servant Doctrine.*

It seems to be thought by many who accept without reflection the doctrine of *respondeat superior* that the so-

called fellow-servant doctrine is an unexplainable exception to a great beneficent rule. A proper analysis makes it clear that the case is far otherwise. So narrow, upon the theory of any jurist, is the ethical basis of the rule of *respondeat superior*, that as soon as the question was fairly raised, it became apparent to the great jurists of England and America that the rule could not on any tenable theory be justly extended to sustain a claim of liability of an innocent employer for a wrong done to his employee by another person occupied as employee in the same general enterprise with the master and with the servant injured. The injured person has voluntarily, and indeed by a formal contract for a proper consideration, engaged himself as one of the aggregate occupied with the work in the course of which the injury happened. If the employer has used due care in the selection of all who are engaged in the work, in the furnishing of materials and appliances, and in superintendence of the work, he has done all that he can do to protect those engaged in the work. Every employee is by contract a consenting party to the doing of the work with such risks of injury to any one as may still remain.

Moreover, if there are special unavoidable risks in any business, these risks are naturally considered by the contracting parties in fixing the remuneration of the employee. Shall the employee be permitted to receive the money which he contracts to take for incurring the unavoidable risks of his occupation, and yet be allowed to repudiate his own obligation to assume these risks?

The ethical principles just suggested may possibly seem to the people of a majority of the States antiquated and outworn. The abolition of the fellow-servant doctrine may

seem to them a necessary step of progress. Until this Federal Act was passed, however, there was no question that the people of each State might decide this issue according to their own conceptions of justice. The people of Texas or Washington might differ in their convictions upon this point from the people of Connecticut, but in each State the people were permitted to live under the rules of law which to them seemed just. By this Act, however, Congress removes this question, so far as a considerable field of conduct is concerned, from the control of the States; and now the voters of Texas are not merely to decide as to the principles which shall within this field control their own relations to one another, but are to help fix upon the people of Connecticut a body of ethical principles regulating (perhaps contrary to their own sense of right and justice) their relations to one another.

(*c*) *Contributory Negligence.*

A more particular examination of the Act now under discussion shows how far its workings will diverge from what the people of Connecticut, at least, have considered to be rules of natural justice. The Act provides that in certain cases of contributory negligence (that is, negligence which is the direct cause of the accident that happened, and without which it would not have happened) the man who by his own negligence causes the injury to himself shall receive compensation at the expense of those who hold the stock of his company, although neither they nor any of the officers of the company are subject to any blame whatever. Take a simple case that might happen any day. Suppose two engineers who have long worked together in the service of the railroad are running trains on the same track. Both of them carelessly mistake or disregard orders. There is a

collision of their trains, and both are crippled for life. Under this Act the negligence of each of them would, as regards the other, be the negligence of the company; each of them was equally negligent; and each of them would therefore be entitled to half of the damages which he suffered from an accident of which he was the direct and negligent cause.

The essential injustice of this rule is aggravated by the intent of this provision of the Act to secure to the plaintiff the benefit of all existing prejudices of any juries against railroad corporations, by expressly leaving the apportioning of the damages, in case of contributory negligence, to the caprices of the jury, free from the wholesome control of the presiding judge, without which no jury system will ever work fairly.

It may be that the majority of the people of the United States in this respect also favor the provisions of this Federal Statute. The point now sought to be made is that Congress by this statute has narrowed the field within which the self-governing States of the American Union have been hitherto allowed to legislate for their own citizens. Hereafter, as shown by the above illustration, if this Act is constitutional, the people of a State may have fixed on them by the votes of other States rules of law governing their relations with one another which seem to them radically unjust.

2. *The Law of Contracts.*

Whatever may be the conclusion of this Court as to the constitutionality of this Federal statute, that conclusion must affect the power of the people of Connecticut to legislate concerning certain important contracts of employ-

ment made in that State, and concerning the personal capacity to contract of an important body of its citizens.

In the main this statute, though apparently dealing with the law of torts, is really acting upon contracts of employment. The liabilities of the employer under this statute are not therein deduced according to any principles of justice from wrongs done by such employer. What this statute says, in the true juridical analysis of its substance and effect, is that there shall be written by the law into all contracts of employment made by certain employers with certain preferred employees, an obligation of the employer to pay damages in case of certain injuries received by these employees in the course of their employment.

The Act goes further. It not only says that an ordinary hiring shall have put into it by the implication of the law these provisions beneficial to the employee, but it says that the employee himself cannot contract with the employer to modify these provisions. Sir Henry Sumner Maine taught us the phrase that the progress of jurisprudence has been from status to contract. The tendency of statutes like this is from contract to status. This statute makes the position of certain preferred employees of certain employers dependent, not on that free contract which is characteristic of modern liberty, but upon rules fixed by law in minute particulars, not resting on true principles of natural justice.

It has been suggested that this Act is analogous to those acts of Congress which are passed to protect seamen.

The main basis of that legislation is the notorious moral weakness of "Jack ashore". In every port of the whole world it has been recognized that a seaman ashore needs

protection as much as a minor child; and upon that fact is mainly placed by the courts the justification of those regulations of the relations between ship and seaman. The people of Connecticut, at any rate, have not considered that the members of the Brotherhood of Locomotive Engineers of the United States are to be put into a class with minors, as unfit to be trusted to make their own contracts.

It is also suggested that individual employees are so dependent on their wages and so helpless when acting alone, that they enjoy no real freedom of contract. Is it possible for anyone, outside of a cloister, to be ignorant that the terms of the employment by railroad companies of the men engaged in operating railroads are everywhere fixed by elaborate contracts resulting from collective bargaining with the railroad by the several great railroad unions? This is not the day of tyranny exercised by employers. If there is any tyranny now to be feared it is the tyranny of trade unions. In all modern bargaining they have the advantage of strength of position. They rarely fail to carry their demands when they have justice with them; and they sometimes successfully make demands against right and contrary to the public interest.

Those who are out of touch with the world's affairs may have no knowledge about the methods of bargaining actually used in settling the terms of the employment of railway enginemen, firemen or trainmen, and may have no information about the general character of these men. In the absence of any knowledge or information upon these points, it should, it would seem, at least be recognized as possible that in Connecticut or some other part of this country, if not in Texas or some other State, there may be

such conditions existing as would naturally and justly cause regret if Federal legislation interferes to prohibit the concession by any State of the right of free contract to employers and employees living and acting within that State.

At any rate (and this is the point specially sought to be now made) it is certainly true that Congress has by this Act sought to limit the field within which a State may hereafter regulate contracts made and enforced within its territory, and also the field within which a State may regulate the contractual capacity of its citizens.

3. *Procedure in State Courts.*

(a.) This Federal statute purports (if intended to be applied by other than Federal courts) to regulate the nature and working of State Courts. In Connecticut for many years most negligence cases were tried by a judge without a jury. This Act in Section 3 not only provides for a jury, but determines what questions must be left to the jury.

(b.) The Act provides in Section 4 for a set-off in cases where no set-off could be pleaded or would be allowed under the laws of Connecticut.

(c.) This Act provides a different limitation of time for the commencement of actions from that fixed by the law governing the Courts of Connecticut and their procedure.

(d.) This Act requires the Courts which enforce it to disregard the settled rule of Connecticut law that no action for personal injury can be maintained against a company unless a written notice of the injury suffered and of the

time, place and cause of its occurrence, as nearly as the same can be ascertained, has been given to the defendant within four months after the neglect complained of.

(e.) The Act is directed (Section 7) against receivers appointed by State Courts and acting as officers of the State Court.

(f.) The Federal Act prevents Connecticut Courts from following a Connecticut statute limiting the amount of damages that can be given for causing a death.

4. *The Distribution of Estates of Decedents.*

The provisions of Section 1 of the Federal Act would require an administrator appointed by a State Court to distribute the damages obtained by him under this Act for a personal injury resulting in death, in a manner at variance with the law of Connecticut. It would, for example, cut off grandchildren of the decedent in favor of parents.

5. *Laws Regulating the Social Welfare.*

(*a.*) *The Safety of Travel.*

It is one of the chief governmental duties of the State of Connecticut to secure public safety throughout its territory, including the safety of public travel within its borders. In the performance of this duty it has seemed to the people of Connecticut (as it did to Chief Justice Shaw in Farwell v. Boston and W. Ry. Corp., 4 Metc., 49) that all those persons who are directly engaged in the transportation of the public for hire should be made to feel that it is to their individual interest to help weed out of the common service all careless or incompetent men. It is impossible for the officers of a railroad company to personally watch

the operation of trains all over its railroad. There are innumerable wilful breaches of rules for safety, many acts of more or less gross negligence and some manifestations of incompetence in the train service of every railroad, which do not happen to produce results that can become apparent to the division superintendent. The superintendent would certainly discipline and probably discharge the disobedient, careless or incompetent employee, if he knew the facts. But the superintendent cannot know the facts, unless some of the conductors, brakemen, engineers, firemen or other employees who happen to be on the spot when the dangerous conduct occurs, do their duty to the public (as well as to the railroad company) by reporting this conduct. If they do perform this duty of theirs, dangerous employees are either reformed or eliminated from the service. If they do not perform this duty, the officers of the railroad company have not the knowledge necessary for this improvement of the personnel of the service, and sooner or later an accident happens—perhaps a great disaster—which would have been prevented if the fellow-employees of the reckless, careless or incompetent man who is to blame had reported his previous misconduct.

Perhaps the conductor and engineer of a freight train are ordered to wait at a certain siding for another train to pass them, or know from the time-table that they cannot run further without getting on to the time of a passenger train. But they are in a hurry to get home. They take their chances and disobediently run to another siding a few miles further on. They happen to make this siding all right, and some of the trainmen on the other freight train which passes them, or some other employees who happen to be out in the country, where this disobedience of orders occurs, alone

have direct knowledge of it. This disobedience, if generally repeated, will sooner or later cause a train wreck. It is of the highest importance for the safety of railroad transportation that as much as possible of such disobedience shall be reported and disciplined. If the conductors and brakemen and engineers and firemen on all railroad trains know that a reckless disregard of rules and orders on the part of their fellow-employees who are running other trains, not only imperils them in life and limb, but may cause themselves and their families to be left in great pecuniary distress, this affords some additional inducement to them to do their duty of reporting such misconduct for its due discipline in the interest of general safety. It seems to the people of Connecticut that such reporting of misconduct is now all too rare, to make it reasonable to lessen the existing motives for it in the operation of the railroads within their territory.

But this Federal Employers' Liability Act prevents the people of Connecticut from providing otherwise than that most of those who are engaged in operating railroad trains in Connecticut are to be free from any anxiety as to the pecuniary consequences to themselves or their families of recklessness, disobedience, negligence or incompetence of those in the same service, whom they might otherwise report for misconduct. The pecuniary burden falling on themselves through a train wreck as a result of any failure by them to help in reforming or weeding out of the service the man who causes the train wreck, must be borne entirely by the railroad company, and no part of it can fall on them or their families.

Indeed, this Act provides that the people of Connecticut may not, in the interest of the safety of travel

within that State, even require all men to bear the full effects upon themselves of their own misconduct. In any personal injury case, contributory negligence means misconduct without which the injury complained of would not have happened. This Act fastens upon the people of Connecticut a rule of law permitting that one of two railroad men whose concurring negligence shall, for example, cause a train wreck within the State, injuring many passengers and destroying much property, may not only by his negligence do great pecuniary damage to his innocent employer, but may also recover in Connecticut courts from this innocent employer part of the pecuniary damages to himself resulting from his own misconduct.

(*b.*) *The Effect of Industrial Accidents on Social Well-being.*

In every modern industry there is involved a more or less considerable risk of personal injury to employees resulting from necessary conditions of the industry in combination with unalterable facts of human nature. There are many who feel that such risks should be borne by the industry, and not be allowed to rest wholly on the person and family of those unfortunate individuals who chance to be the particular victims of such risks. They argue that it is against the interest of society to permit the social submergence of families, and the neglect in the rearing of children which often thus results, when this consequence might be prevented by distributing the natural industrial risks of personal injury over the industry as a whole.

In Europe, legislators have adopted elaborate systems of insurance of workmen against industrial accidents,

which involve large contributions on the part of employers. In some states the operation of these laws is compulsory; in others it rests upon an agreement between employers and employed.

Many of those in this country who approve most heartily of the principles underlying the more recent labor legislation of Europe are nevertheless more or less dissatisfied with the practical working of all the various labor laws which have yet been enacted, and cherish the hope that by thoughtful experimental legislation, the States of the American Union may work out a system of law for justly distributing general industrial risks, which may be better than any yet tried.

But if the burden to be laid on employers is not to be made so heavy as to be inimical to the progress of industry, employers who are made to contribute reasonably to the insurance of their workmen against personal injury, ought not to be still subjected to liability *as for a wrong*, in cases in which they are actually guilty of no wrong. This Federal Act which compels a state to hold certain employers liable in compensatory damages for another's wrong, is a serious obstacle to such a broad-minded treatment by the several States of the relation of employers to industrial risks as might otherwise be reasonably hoped for.

C.

CONSTITUTIONALITY OF THE ACT OF CONGRESS.

I.

An Inquiry Whether a Given Statute is an Exercise of Powers Granted to Congress or Reserved to the States is Not Affected by Any Legal Presumptions.

Results from which an honest analytic reasoner would otherwise shrink are sometimes produced by the use in argument of legal presumptions. It seems worth while, therefore, to inquire explicitly in this important case, whether the constitutionality of this statute may properly be sustained in any degree by the application of any legal presumption.

There is a class of cases in which the constitutionality of a statute depends on a determination of the question whether the intent of the legislature was a purpose to promote the general welfare, or on the contrary, some other arbitrary purpose at variance with the "law of the land." In such cases the courts will not assert their own judgment as to the beneficial or unwholesome effects or tendencies of the statute in question against the exercise by the law-making body of its own judgment upon this issue. The principle which is better thus stated, is sometimes loosely expressed in the form of a legal presumption in favor of the constitutionality of a statute.

It is submitted that any presumption having intrinsic logical weight is unjustifiable in an inquiry whether a given statute is an exercise of powers granted to Congress or re-

served to the States. The powers of the Federal Government within its province and the self-governing powers of the States within their province are of equal *national* importance under the Constitution of the United States. The judicial delimitation of the province of government of the President and Congress from the province of government of the States is a high trust committed by the Constitution to this great Court to be exercised without legal prejudice in favor of the invasion by either government of the province of the other. Whether the question be as to the invasion by a State legislature of the province of Federal government or as to the invasion by Congress of the province of State government, the scales of justice should not be weighted in advance by any presumption whatever. This great trust of political arbitration, which in itself renders this Court the most important tribunal in the world, has been in the past and without doubt will be in the future administered by this Court in absolute freedom of right reason.

II.

A Rational Criterion.

An inquiry as to the province of government within which a given exercise of legislative power rationally belongs, naturally proceeds by a consideration of the substantive, direct and principal effects of the statute, as distinguished from its incidental, indirect and subordinate effects.

Commerce in general, and therefore between the States as well as within the States, is so dependent upon conditions of social well-being, that it must be more or less affected incidentally and indirectly by anything that affects the social

welfare. Consequently, if every statute which incidentally and indirectly affects, for good or ill, and to any extent, commerce between the States, is an exercise of power within the province of the Federal government, the whole field of the general governmental powers, sometimes designated the police powers, is at once brought within the pale of Federal sovereignty. Such a logical result shows the principle from which it follows to be at variance with the whole course of the historical constitutional jurisprudence of the United States.

If the statute now under examination merely affects interstate commerce in an incidental, indirect and subordinate way, in such manner as any statute may, which affects the well-being of society, it is not thereby shown to be within the constitutional province of the Federal Government.

If this statute, judged by its substantive, direct and principal effects and tendencies, is an exercise of powers which have been constitutionally reserved to the States, it is thereby shown to be outside the province of Federal Government.

III.

Verbal Juggling with the Constitution.

The able representative of the Executive Department of the Federal Government who appeared before the Court below to argue for the plaintiff, urged upon that Court the importance and beneficence of several purposes which he said were purposes of Congress in this legislation.

The distinguished Attorney General and his associates said in their brief below, to begin with, that the Act is a wise step toward the establishment of justice and fair dealing among men. They did not satisfy the Court below of the truth of this assertion. But in any event, is it now contended by the Executive Department of the Federal Government that the general administration of social justice and the establishment of fair dealing among men are henceforth to be regarded as in themselves within the sphere of the Federal Government?

It is said that this Act is a beneficent statute intended to provide for a better distribution of the burdens of industry. Is it the function of the National Government to indulge in general socialistic beneficence? Are poor-laws, or is any kind of legislation that rests upon the same fundamental ethical principle as poor-law relief, within the competence of the National Government?

Is this statute defended because it is a protection of those who are weak against the strong? Such a defence of this legislation will never be suggested by anyone who does not shut his eyes to the actual labor conditions of to-day. But in any event, unless there is a revolution in the interpretation of the United States Constitution, the protection of citizens against peculiar weaknesses of any sort is not for the National Government, but for State Governments.

Is it a purpose of this Act to provide that a certain industry shall bear, as a whole, the burden of the peculiar hazards of that industry? It seems impossible to bring this Act as a whole within the limits of any such purpose,

because the statute clearly applies to hosts of employees (indeed much more than half of the total number of employees affected) who are not subject to any special hazards at all. But in any event, is the regulation of the burden of the hazards of a particular industry a matter for the Federal Government, or a matter for the Governments of the several States?

No one actually undertakes to constitutionally justify this statute except as an exercise of the power of Congress to regulate commerce between the States. It is hoped that argument about the beneficence of the statute is not urged upon this Court in the spirit of a New Nationalism, which seeks to extend the Federal Power into fields that confessedly do not in themselves lie within its constitutional domain, by means of a verbal juggling with that clause of the Constitution which confers on Congress the power to regulate commerce between the States.

IV.

Reach of the Power of Congress to Regulate Commerce.

It has been decided by this Court that commerce may be regulated not only by statutes affecting the instrumentalities of interstate commerce, but also by statutes affecting the relations of those engaged in such commerce. It does not however follow that every statute affecting the instrumentalities of interstate commerce or affecting the relations of those engaged in such commerce is necessarily a regulation of commerce.

This was, however, the logical position taken by counsel in arguing for the plaintiff in the Court below. The result of this logic is startling and apparently revolutionary.

(a) Counsel arguing below for the plaintiff contended expressly that Congress has the same powers over railroads engaged in interstate commerce that it has over the navigable waters of the United States, and the ships thereon.

This proposition is one of tremendous reach. The South Manchester Railroad is a railroad in Connecticut, which though only about three miles long and distant from the State boundaries, is an instrumentality of interstate commerce. It is a common carrier. Raw silk one way, and silk goods the other way, are constantly passing over it, and between its terminus and a dozen points outside of that State. All this raw material comes from without the State, and most of these manufactured goods go without the State. The South Manchester Railroad is, therefore, an instrumentality of interstate commerce, and the Executive Department of the Federal Government says that Congress can regulate such an instrumentality in any way. Such has not been commonly supposed to be the law. It was understood when the Constitution was framed that one of its purposes was to protect the freedom of navigation on the public waters of the United States. Was it supposed that the same jurisdiction that existed over the world's highways, furnished by nature, existed over the highways of a State, which were as truly pathways of interstate commerce and instrumentalities of interstate commerce as are the railroads of to-day? It was never thought of. It is respectfully submitted that it ought not now to be thought of. Jurisdiction may be entertained over the public waters of the

United States by the Federal Government without trenching on the natural sphere of the State governments. There are infinite reasons for uniformity of regulation upon those waters that do not exist within the domain of private landed property. You could not regulate highways, you could not regulate canals, you could not regulate railroads, without removing from the sphere of regulation of State Governments an immense mass of jurisdiction which has always been held peculiarly appropriate to be exercised by the States. If the proposition advanced below is correct, it is open to Congress to establish a National Board of Railroad Commissioners, which shall exercise at least nine-tenths of the functions now exercised by the Railroad Commissioners of the several States. The elimination of grade-crossings, the provisions for the double-tracking of railroads —a thousand and one things that have always been within the domain of State sovereignty, are removed within the pale of National administration.

In the case of Railroad vs. Maryland, 88 U. S., 456, this Court said:

> "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal Governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared, to hand, that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the

> navigator to use them. Again; the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the National Legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair and management, to State regulation and control. They were all made either by the States or under their authority. The power of the State to impose or authorize such tolls, as it saw fit, was unquestioned. No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to national regulation."

This Court then went on to point out that when canals came to be built, no one supposed that they were within the sphere of national jurisdiction, and affirmed that the State of Maryland had jurisdiction over the railroads within its borders, although they were parts of a railroad system extending into several States.

(*b.*) Counsel for the Executive Department of the United States argued in the Court below, not only that Congress might pass any law concerning instrumentalities of interstate commerce, but by like logic that Congress might pass any law concerning the relations of those engaged in interstate commerce. They said, indeed, that this Court has so held in the Howard case. This at least seems not to be true.

The language in question, which was used by Mr. Chief Justice White in the Howard case, seems to be negative and not affirmative in its intent. It denies the universal validity of the proposition, seemingly urged on the Court, that a regulation of the relation of master and servant is necessarily beyond the power of Congress. There is nothing particularly sacred about the relation of master and servant, which renders it absolutely beyond the reach of Federal control. In any case where Congress needs to affect the relations of master and servant in order to protect the free flow of commerce, Congress has a right to so legislate.

It was not held in the Howard case that the act before the Court was constitutional; and this Court had never seen this Act which is now before it. This Court did not say, as was said in argument in the court below, that every regulation of the relation of master and servant was a regulation of commerce. This Court did not say as was said there, that every regulation of the liability of employer to an employee engaged in interstate commerce is a regulation of commerce. The Court merely refused to hold that it could not possibly be a regulation of commerce.

At the time when the Constitution was adopted, no one supposed that those engaged in commerce between the States could be regarded as a class apart from the general body of citizens of a State, so that all of their social relations could be differently regulated by action of Congress from the social relations of the other members of the community. No one at that day imagined that merely because a certain set of citizens of a State should be engaged in interstate commerce, principles of social justice different from those accepted by that State and perhaps

abhorrent to the public sentiment of the community must be applied by the Courts of that State, in determining not only whether or not these citizens were guilty of wrongs, but also what juristic consequences should follow as between the wrongdoer and the person wronged. No one then supposed that any power external to the several States of the American Union might determine the capacity of the citizens of a State to contract with one another within that State, merely because they were engaged as stage drivers in interstate transportation. No one then had any idea that the State might not enforce on all its citizens the same rules for the distribution of estates of decedents because some of them should be engaged in interstate commerce. No one thought that the public policy of a State regulating the distribution of the burdens of industrial accidents would be inapplicable in the case of certain of its citizens, merely because they were engaged in interstate commerce. Certainly no one suspected that some day the rules of procedure of the Courts of a State might be held inapplicable in those Courts to certain of its citizens, merely because they were engaged in interstate commerce.

In the Adair case the very essence of the decision is that while a regulation of the relation of employee and employer may be permissible to Congress, *if* it is a regulation of commerce, it must be ***shown*** to be a regulation of commerce before it can be thus sustained. And the Court expressly holds, that it must bear some apparent and logical relation to the flow of commerce in order to be thus sustained.

V.

Congress has not Indicated in the Title or the Body of this Act a Purpose to Regulate Interstate Commerce.

There is nothing in this Act about interstate commerce except a partial limitation of the effect of its provisions to persons engaged in such commerce. But the legislative powers exercised with relation to these persons are not declared or even indicated by Congress as intended to affect *commerce itself* in any way whatever. The title of the Act is, "An Act to regulate the Liability of Employer to Employees." The whole burden of the Act from beginning to end renders it necessary to admit that this title is completely and fully descriptive. So far as appears from any declaration of Congress on the face of this Act, the intent of the statute cannot be said to go further than the regulation of certain relations of those engaged in interstate commerce without any pretense of regulating such commerce itself.

Under the doctrine of the Howard case and the Adair case, the Act now before this Court certainly cannot be held valid unless it so regulates the relation of railroad employer and railroad employee that it is in substance and effect a genuine regulation of commerce.

VI.

Is this Statute a Regulation of Commerce?

A distinguished lawyer in Massachusetts, in giving a private opinion, used this language: "This statute has no more effect on commerce than would a law requiring all freight cars to be painted pea-green, or all brakemen to part their hair in the middle."

We respectfully urge on this Court a careful consideration (free from all presumptions and prejudgments) of the question whether this particular regulation of the liability of employer to employee, both being engaged in interstate commerce, does really regulate commerce. Are its apparent effects and tendencies substantially and directly concerned with the flow of interstate commerce? Is the Act logically and naturally adapted to affect the flow of commerce, or to affect commerce at all?

The counsel on the other side of this argument are striving hard to find some actual effect of this statute on commerce. Yet there is no pretence that the statute can have any such effect unless it affects safety; and the learned counsel will concede that its only possible effect on safety is by inducing the employment of men who are not careless or reckless. They assume, indeed, that Congress has declared in this Act that this is the purpose of it. But Congress has not so declared. Nothing can be found in the Act from beginning to end (except the one section about the Safety-Appliance Act) to show or even suggest that the body of the Act has anything to do in the mind of Congress with the safety of travel. And is it possible that a provision was intended against carelessness and recklessness, whose result is that the careless and reckless man must be paid, by one entirely innocent, for the effect on the injured man of his own carelessness and recklessness? Yet such is one of the provisions of this Act. Suppose that an engineer negligently disregards an automatic signal and so derails his train by running into a switch which a switchman has negligently left open, and that the switchman is crippled for life by an overturned car in the midst of the wreckage. Under the language of this

Act this switchman may recover heavy damages from the innocent railroad company on account of an accident, of which the switchman's gross negligence was the direct and proximate cause.

Again, is an Act logically adapted to prevent carelessness and recklessness on the part of employees, when its chief effect is to make one innocent of wrong doing—the employer—liable to his employee for every act of recklessness or carelessness of the men with whom such employee comes in contact every day, and whose conduct he has power to influence in many ways? It is respectfully submitted that the effect of such a law is necessarily and naturally the other way, for necessarily and naturally it removes an inducement to all employees, thus affected, to co-operate with the company by reporting breaches of rule, so as to help the weeding out of the reckless and incompetent.

If the real purpose of Congress had actually been to secure safety in the operation of railroads, would either of those provisions have been in this Act? It is impossible to so believe. And the only pretense that there was any such purpose in anybody's mind is the pretense that if you make the railroad companies' liability heavier you will make them more careful. And this in face of the fact that the pecuniary inducements to get rid of carelessness and recklessness are now so tremendous that you could not give them greater motive power! And this, also, in face of the further fact that the hiring of competent men, the retention of competent men, the assignment of jobs to suitable men, this country over, has by the contracts between the railway orders and the railroads been taken out of the hands of the managers of the railroads, and

been assumed by the men themselves—*assumed by the men themselves*, who by the force of this Act have their motive for getting rid of the reckless and incompetent weakened instead of strengthened!

No man that is familiar with the simplest elements of human psychology, no man who is familiar with the actual industrial conditions prevailing on the railroads of this country, can, it would seem, venture to hold that this Act of Congress is naturally, logically and apparently adapted to secure from impediments the flow of commerce between the States.

But there is the *crux* of this question. This whole case may be determined just here. Unless this Court affirmatively sees that this statute does naturally tend to promote the free and safe flow of commerce between the States, then, under the doctrine of the Adair case, as well as of the long line of decisions preceding that case, there is no possible pretext left for holding that this law is within the powers of Congress.

VII.

Statute not confined within the Sphere of Congressional Power.

We come now to another branch of the discussion. If it be now conceded, for the purposes of argument, that this statute is in some respects a regulation of interstate commerce, the question still remains whether its provisions do not also reach to other matters of regulation beyond the lawful sphere of Federal power.

In the Howard case the opinion of the Court lays stress upon the circumstance that the Act then in question reached by its regulations injuries caused by employees not engaged in interstate commerce. That defect has not been cured in this Act. This Act, like the former Act, regulates the relation of the employer to an employee engaged solely in intrastate commerce, by making the failure of the employer to prevent such negligence the basis of liability of such employer.

But this defect, real though it is, seems but a minor circumstance upon a full consideration of other effects of the Act. The analysis of the Act attempted in an earlier part of this brief is respectfully urged on the attention of the Court as indicating in how many and diverse ways this Act invades the hitherto acknowledged province of State legislation.

It is implied, if not said, by those who argue here for the plaintiff, that it is unimportant how far any provision of a Federal statute affects the acknowledged field of State legislation, if it is at the same time an exercise of a power granted to Congress.

It is assumed rather than argued that the powers granted to the Federal Government by the Constitution of the United States are paramount over the powers reserved by that instrument to the State Governments. It is, however, respectfully submitted for the defendant that such a doctrine is based on a serious misunderstanding.

The Constitution of the United States protects the legitimate powers of the State Governments as fully as it does the legitimate powers of the Federal Government. One

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class of powers is as sacred as the other under the Constitution of the United States. No power is more paramount than the Congressional power of taxation. But when Congress, in the stress of war-times, undertook to tax the processes of the courts of the States, this Court held that even the Congressional power of taxation is not thus paramount and that it cannot be exercised to interfere with the legitimate functions of the Governments of the States. The *Constitution and its purposes* are paramount, but one of its main purposes is to delimit the functions of the two elements of our dual government—to delimit the functions of the Federal Government, and the functions of the State. If any purpose of the Constitution is paramount over all, it is that purpose.

Although it is the *Constitution and its purposes* which are paramount, and not certain powers of Congress, it may be agreed that when the Constitution is read in the light of history, as it must be by Courts, there are certain main purposes to which other purposes of government may rightfully be declared subordinate, in case of conflict. It is impossible for a student of our historical constitutional development to doubt that one of the main purposes of the Constitution is to maintain the freedom of the flow of interstate commerce. When a State has undertaken to tax the carriage of passengers or freight across its borders, that action has been declared unconstitutional—not because the power of Congress to regulate commerce was paramount over the power of the State to tax—but because a main purpose of the Constitution was paramount over the purposes involved in such legislation, and because it is necessary to limit the exercise of any power of State government which shall interfere with one chief, great, main purpose of the Constitution,

namely, to prevent hindrance by any State to the passage of commerce through it, to and from other States. What is paramount is *that purpose* of the Constitution, and not a power of Congress.

The limitations similarly placed on quarantine regulations by States are similarly justified. The State of Arkansas made a law for the quarantining of cattle to check the spread of disease, which in the opinion of the Supreme Court of the United States was in its tendency an impediment to the proper flow of commerce. That law was declared unconstitutional—not because the power of Congress to regulate commerce was in and of itself superior to the police power of the State of Arkansas, but because the *purpose* of the National Constitution to preserve the freedom of commerce was paramount in limitation of such legislation.

The Safety-Appliance Act seems to be sometimes put upon too narrow a ground of defense. Why was it legitimate for Congress to pass that act? Was it merely because it tended to make travel safer? There was much more than that to justify it. It is necessary for safety that there shall be an automatic form of coupling and that there shall be air-brakes. But there are a great many varieties of couplings. There are differences in air-brakes. If Connecticut authorities chose one form of coupling for their cars and New York authorities another for their cars, you could not make up a train with automatic couplings out of Connecticut and New York cars. But it is a fact that the freight cars of this country pass from California to Maine, over the railroads of many companies, and form an element in all trains. Here then is a case where there can be no proper regulation, no proper removal of an impediment to interstate commerce

through State legislation. Without Congressional action, there can be no enforcement in this field of legislation of a main purpose of the Constitution, namely, to secure the most uninterrupted and safest flow of commerce. The complete justification of the Safety-Appliance Act lies in this consideration—that uniformity of legislation throughout the country was required, in order that interstate commerce might flow most freely and securely, and that therefore it was within the province and duty of Congress to make such legislation.

It is not sound constitutional law that where some plain purpose of the Constitution does not prevail to limit the exercise of State power, Congress can trench upon the sphere of government of the States, simply because it can be claimed that the legislation in question is a regulation of commerce. The vital question is—not whether a power of Congress is paramount over a power of a State legislature—but whether under the great purposes of the Constitution, the power of a State to regulate in all their minutiæ the domestic affairs of its citizens should in a particular case be limited by the necessity of protecting the flow of commerce between the States. There are few limits to this power of Congress to regulate commerce, or to the exclusiveness of it, when the question really is of protecting the freedom of the flow of commerce across State boundaries; for historical students know, and reflective philosophical students know, that the protection of the freedom of interstate commerce ought to be recognized as a main purpose of the Constitution. But there is nothing sacred in the power to regulate commerce that makes it superior in itself, and where that main purpose of the Constitution does not exist, over the power of the State to regulate the affairs of its citizens in

the ordinary relations of life. On the contrary, it may rather be said that it is the most important and fundamental purpose of the Constitution of the United States to protect from interference by either element of our dual government the lawful sphere of the other ; and that this purpose should control and limit any attempted invasion of the sphere of State Governments by Congress under the guise of a regulation of interstate commerce, when the real purpose of the Act in question is essentially unconnected with the freedom of commerce.

VIII.

Effect of Statute on Intrastate Commerce.

It has been argued in an earlier part of this brief that this act does not by its provisions indicate that it was intended to favorably affect the flow of commerce, and that it is not a genuine regulation of commerce. It is, however, now further submitted that if it is in any respect or to any extent a regulation of commerce, it is in that respect and to that extent a regulation of intrastate commerce.

This Court may take judicial notice of the fact that every train of every railroad carries both intrastate commerce and interstate commerce. Those whose relations are sought to be regulated are just as much engaged in commerce within the States as they are in commerce between the States.

In the case at bar, at the moment of the accident, not only was the defendant company engaged in intrastate commerce as much as in interstate commerce, but every employee upon the trains in question was employed by that company just as much in intrastate commerce as in

interstate commerce. If this Act of Congress is a regulation of interstate commerce, because it is a regulation of the relations of those engaged in interstate commerce, it is, in the same way and *to the same extent*, a regulation of domestic commerce within the State. Therefore, it is submitted that the Act, if a regulation of interstate commerce, is in all its applications, at all times, a regulation just as much, and in the same way, and to the same extent, of a province that is by the very terms of the Howard case kept sacred from National regulation. And it is not for one moment admitted that the power of a State to regulate the commerce within its borders is in itself inferior to the power of Congress to regulate commerce between the States. Except in cases in which it can be shown that the purpose of the Constitution to preserve the freedom of flow of commerce, and to prevent the State from impeding that flow, is actually dominant, the power of the State over intrastate commerce is equal to the power of Congress over interstate commerce. It is respectfully submitted that, unless for the great constitutional purpose of protecting freedom of interstate commerce, uniformity of legislation is necessary, an Act which, whenever it affects interstate commerce, affects in all its applications, in the same way, and to the same extent, intrastate commerce also, falls absolutely within the ban of the express ruling of the majority of the Court in the Howard case, as well as of the whole current of the decisions of this Court from the earliest times down to the present.

To avoid misunderstanding, it may be well to make it clear that this reasoning does not rest on a general proposition that Congress may not in any case legislate concerning

interstate commerce if its legislation must also affect intrastate commerce.

It has been pointed out that Congress might have to legislate concerning railroads engaged in intrastate as well as in interstate commerce so as to regulate matters requiring uniformity of commercial regulation. If Connecticut, for example, might pass a law concerning the form of automatic couplers which would unfit the cars of a railroad corporation within its territory for use in trains intended to pass into other States, that condition of constitutional law would permit the State of Connecticut to create an impediment to the flow of commerce between States. Therefore, it becomes the constitutional province and duty of Congress to enact a Safety-Appliance Act for the railroads of the country.

It has been above said that it is a chief purpose of the Constitution of the United States to secure for commerce between the States all possible freedom from interruption by State legislation. It was not said nor is it meant that the power of Congress to regulate commerce is confined within the limits of that purpose. He would be a rash man who would undertake to phrase a sentence or a page which would be a full and accurate description of the limits of the power of Congress over interstate commerce and commerce with foreign nations.

There may undoubtedly be an exercise by Congress of the power to regulate commerce which is not within the constitutional purpose above described. Congress may, perhaps, regulate commerce between the States by excluding certain articles from such commerce. Since here the great

constitutional purpose of keeping commerce free would be plainly non-existent, in this application the Congressional power to regulate commerce ought to have no special paramount effect when in conflict with the powers reserved to the State. In such a case, or in the case of any Act which grips deep into the province of State government for purposes not actually and honestly connected with the maintenance of the free flow of commerce, it is submitted that such Act of Congress should be held to be beyond the power of Congress because it is more than a regulation of interstate commerce, and is in substance and essence an invasion of the sphere of government reserved to the States by the Constitution of the United States.

IX.

Fifth Amendment to the Constitution of the United States.

We come now to still another element of this case. There remains still the question whether the Court below was correct in holding that this Act of Congress, even if its subject-matter is entirely within the field of Congressional legislation, is so framed as to violate those broad principles of justice which constitute the foundation of a government of law, and that it is therefore contrary to the "law of the land," and so to the Fifth Amendment of the Constitution of the United States.

1. This Court has established firmly the principle that the "law of the land," sustained by the Fifth and Fourteenth Amendments of the Constitution of the United States,

protects against legislation the right of free contract as one of the fundamental, inalienable rights of the American citizen.

One of the chief vices of this statute, permeating the whole of it, is that it takes away from adult men of a high class of intelligence, the right to contract in certain most important particulars as to the conditions of their employment.

One case may be put for purposes of illustration, which will perhaps especially appeal to students of labor legislation. It is the tendency, the world over, to substitute for employers' liability acts, some form of workmen's compensation act or of workmen's insurance act. Not only Germany but also Switzerland and Norway have adopted compulsory insurance for the benefit of all ordinary wage-earners. Italy and France have laws providing for voluntary systems of such insurance. England has adopted not only a universal workmen's compensation act, but also a workmen's pension law. At a recent meeting of the American Association of Economists, it seems to have been the general opinion that the trend of labor legislation should be in the direction of workmen's compensation acts or workmen's insurance acts.

Now let us assume that in Connecticut, or in any of the States of the Union which are deliberating on this subject, it may be thought wise to substitute for the present system of employers' liability to employees, a widely different system of one of the European types, or of some still better type, and let us assume, as I think we safely may, that workingmen would gladly agree to such a substitution. This Act of Congress forbids the men affected by it to accept a

contract of employment under such a substituted system of protection for workingmen. And who are the men thus denied their freedom of contract? Are they morally or intellectually weak, or in any way helpless? On the contrary, they are adult men of exceptional vigor and intelligence, who deal with their employers not by separate individual bargaining, but collectively as members of the strongest labor unions of the United States, industrially and politically powerful beyond all other single elements in this country.

It is respectfully submitted that the *ratio decidendi* of the Adair case, which held that the taking away of the freedom of contract as between employer and employee of a railroad company engaged in interstate commerce was in violation of the Fifth Amendment, applies fairly and fully to this legislation.

2. It is submitted that a law which takes the property of one who is without fault and gives it to another, in order to compensate the latter, whether in whole or part, for the consequences of his own fault, deprives the former of property without due process of law. In the illustrations referred to in this brief (easily varied extensively without leaving the range of ordinary railroad experience) in which two men engaged in the operation of a railroad cause by their concurring negligence an accident which injures one or both of them, it may be that the railroad company loses heavily through damage to its own property or through its liabilities to others whose persons or property may be injured. Yet it is not to be enough that the company is to be subjected to what may be tremendous losses through the more or less gross negligence of a trusted employee, but the company

must under this law also make good to this employee some proportion, to be determined by the caprices of a jury, of the damage which he has done to himself by his own wrong against the company.

This effect of the statute is sometimes defended by a reference to the fact that the doctrine of contributory negligence is not recognized by Courts of Admiralty. In general the rule of the common law that there is no contribution between wrongdoers does not prevail in maritime law. But the maritime law as a whole produces no such effects as are produced by this statute. In the maritime law there is no liability for negligence of fellow-servants. Furthermore, even when the owner of a ship is liable to a seaman for the results of unseaworthiness of the ship, the seaman is not entitled in admiralty to indemnity but only to maintenance and cure.

The Osceola, 189 U. S., 158

See also Harvard Law Review, Vol. 19, p. 445. Article on *Respondeat Superior in Admiralty.*

3. It is submitted that the provisions of this Act rendering a railroad company liable, *when itself without fault,* to some of its employees for acts of their carefully-selected fellow-servants, is at variance with long established rules of American and English jurisprudence based—not on positive legislation—but on what has been conceived by common consent to be an underlying body of principles of natural justice. It may be that such rules and such principles may be constitutionally disregarded by legislation, if the legislation affects society at large through a well-considered exercise of the police-power for the general welfare. But

this Act of Congress sets aside these rules and principles of justice, and makes railroad companies responsible in damages for wrongs in which they have no part, and to men whose opportunity to guard against the happening of such wrongs is under actual present conditions even greater than that enjoyed by the general officers of the railroad companies, and does this—not for the sake of some general social rearrangement, nor through any important application of some other guiding principle—but arbitrarily and partially by provisions of law taking the property of one class of employers only, and for the benefit of a certain class of employees only.

4. The Act is arbitrarily discriminative. Mr. Justice Moody in his minority opinion in the Howard case argued that there had always been in legislation a treatment of railroad carriers as a class apart. Is this to be understood as meaning that because, owing to peculiarities of railroad business, certain provisions of law might be made to apply to them alone, therefore any provisions of law may constitutionally be made to affect railroad companies alone? That would clearly be a *non-sequitur*.

The present Chief Justice, while refusing to pass on the particular question now under discussion, referred to three cases, in which the Supreme Court of the United States had sustained under the Fourteenth Amendment to the Constitution of the United States the laws of several States regulating specially the liability of railroad companies to their employees. It is important, however, to note that in the opinions of the Courts of those States as to the meaning of their own laws, which were conclusive and binding upon

the Supreme Court of the United States, it had been held that those laws were to be limited in application to those who were engaged in a specially hazardous occupation. Many State Courts in interpreting their own laws which on their face applied to employees of all railroad companies, have held that if so construed they would be contrary to the provisions of the Fourteenth Amendment, and that in order to sustain these laws they must be, even by straining the language, limited in their application to those engaged in the hazardous occupation of *operating* a railroad. Under this condition there might be found a logical ground of singling out certain employers and certain employees for certain exceptional legislation. The operation of a railroad is an unusually hazardous operation, and the employer engaged in that unusual occupation, and the employee so engaged, may because of that be treated differently.

Medaris v. R. R. Co., 60 Kans., 151 (1899) ;
Deppe v. R. R. Co., 36 Iowa, 52 (1872);
Foley v. R. R. Co., 64 Iowa, 644;
Akeson v. R. R. Co., 106 Iowa, 54 (1898);
Indianapolis, etc., Ry. Co. v. Houlihan, 157 Ind., 494, 501; 60 N. E., 943; 54 L. R. A., 787;
Bedford Quarries Co. v. Bough, 80 N. E., 529 (Ind.), (1907);
Ballard v. Miss. Oil Co., 81 Miss., 507; 34 So., 533; 95 Am. St. Rep., 476; 62 L. R. A., 407;
Lavallee v. St. P., M. & M. R. Co., 40 Minn., 249; 41 N. W., 974;
Johnson v. St. P. & D. R. Co., 43 Minn., 222; 45 N. W., 156; S. L. R. A., 419.

But no such defense can be made of this Act. In the first place, Congress has nothing to do with the hazards of an occupation. That is for the States.

In the second place, this Act confessedly is not limited in its applications to those engaged in the *operation* of railroads. It affects all the employees of railroad companies engaged in interstate commerce, more than half of whom have nothing to do with the *operation* of a railroad. If a clerk in the auditor's office who is engaged in auditing the accounts of an interstate railroad, goes down in the elevator of the company's office building, and is injured through the fault of the operator of that elevator,he gets the benefit of this Act; but an employee on a local street railway, perhaps owned by the same employer, who is injured at the same time, is not benefited by it.

It is urged in partial defense of the discrimination of this Act that the powers of Congress did not extend to the protection of those not employed in interstate commerce, or to the regulation of the liabilities of employers not engaged in such commerce.

In the first place, it is suggested in reply that this is a very good reason why Congress, being limited as it is in power, should not undertake to legislate where it cannot legislate justly. It may be, as suggested in that opinion of the United States Circuit Court upon this Act heretofore cited, that a just law might be framed for the purpose of distributing widely the burden of injuries incident to general industrial conditions, so that these burdens should not fall with crushing weight on the particular families which may happen to be the immediate victims of these conditions. If there were a law passed for this purpose affecting all industries and embracing all employers and all employees, it is possible that in the long course of time and in a general way, most of the burden immediately cast by the law on employers might

be thrown off on to those members of the general public who pay for their services and products. But there is no such tendency in the operation of any such limited law as Congress could constitutionally pass.

In the second place, it is suggested in reply that Congress has not attempted to follow even the guiding principle of an impartial application of its legislation to all engaged in interstate commerce.

Why does not the Act apply to express companies? The express messenger is subject to the same hazards as a baggagemaster. Why does not the Act apply to telegraph companies? To telephone companies? To steamship companies? Why does the Act apply to railroad companies' employees and not apply to employees of these other companies? All of these other companies are declared in the Howard case to be engaged in interstate commerce.

Note, furthermore, that in the last clause of the first section this Act differs from the former Act of Congress by adding the words "boats and wharves." The New York, New Haven & Hartford Railroad Company, it is a matter of common knowledge, runs many boats, and has many wharves. It runs, for example, in interstate commerce from Harlem River to Jersey City. The Southern Pacific runs boats from New Orleans to New York. Why should there be a special liability of that class of owners of boats and wharves, and not of other owners of boats and wharves engaging equally in interstate commerce.

It is respectfully submitted that in arbitrarily and partially singling out railroad companies among employers to deprive them of property in violation of well established principles

of justice for the benefit of a preferred class among wage-earners, Congress has violated the Fifth Amendment of the Constitution of the United States in that it has attempted to deprive such companies of property without due process of law.

X.

Summary.

The following conclusions are submitted for the consideration of the Court:

1. The relations of master and servant, and specifically the liability of the master in case of injury to a servant, are in themselves matters for regulation by the States, and are not, in general, within the sphere of the National Goverment.

2. From the mere circumstance that an Act of Congress regulates the relation of master and servant, it does not necessarily follow that it may not also substantially affect the course of commerce beween the States; and there is no peculiar sacredness about this particular relation, which should hedge out the National Goverment from dealing with it, if and when Congress is truly acting under the power to regulate commerce between the States, within the limits established by the Constitution of the United States.

3. The mere circumstance that persons are engaged in interstate commerce does not make all their affairs and mutual relations subjects for regulation by Congress, or render any statute affecting the affairs and relations of such persons a regulation of commerce between the States, and therefore void if enacted by a State legislature, and

valid if enacted by Congress. Such a statute must at least actually and substantially affect the course of such commerce.

The application of this rule is alone sufficient for a complete disposal of this whole case. It is difficult to believe that anybody, awake to facts and willing to face them, can believe that this Act does in reality affect the course of commerce between the States.

4. An Act of Congress may affect the course of interstate commerce in some of its applications, but if it has also other substantial important applications in which it will not so affect interstate commerce, it is not in these last mentioned applications a valid exercise of the power of Congress to regulate commerce, and, unless sustained by some other constitutional provision, is to this extent at least an invalid law. And where the applications of an Act of Congress which are beyond the power of Congress are not applications of separable parts of the act, but are applications of the statute as a whole, or of the particular provision in question, then this whole statute, or this whole provision, is invalid.

And it is respectfully submitted that this Act embraces provisions without which it would never have been enacted at all by Congress, which invade the sphere secured by the Constitution of the United States to the Governments of the several States.

5. An Act of Congress may directly and substantially affect the course of commerce between the States, and yet be invalid, if it violates the fundamental principles of justice and social order upon which rests the distinction between

an arbitrary government and a government of law, so as to deprive any person of life, liberty or property without due process of law.

In determining whether any statute does, within the meaning of the Constitution of the United States, deny to any person the protection of the "law of the land," the judiciary will always look beyond the form of the statute, and refusing to be trammeled by fictions or technicalities will consider it as constitutional statesmen, whose eyes may and should be fully open to all actualities of the present, and all substantial potentialities of the future.

It is respectfully submitted that this Act, even if it is a regulation of interstate commerce, has been so framed as to be invalid under the Fifth Amendment of the Constitution of the United States.

EDWARD D. ROBBINS,
Of Counsel.

WILLIAM H. HOXIE v. NEW YORK, NEW HAVEN & HARTFORD R. R. CO.	NEW HAVEN COUNTY, JUNE TERM, 1909.

Action by an inhabitant of Connecticut, brought to the Superior Court for New London County, against the New York, New Haven & Hartford Railroad Company, described as a corporation organized under the laws of Connecticut, for an injury received by him while acting as a train hand on its railroad at Auburn in Massachusetts. The complaint alleged an injury received while the plaintiff was coupling cars in a train running from Norwich, Connecticut, to Worcester, Massachusetts, and due to the negligence of a fellow servant in control of another train of the defendant, running between Hartford, Connecticut, and Worcester; and claimed damages "under and by force of the Act of Congress approved April 22d, 1908, relating to liability of common carriers by railroad engaged in commerce between States." A demurer to the complaint was sustained (R. Wheeler, J.) and judgment rendered for the defendant. *No Error.*

BALDWIN, C. J. The plaintiff bases his action solely on the Act of Congress of April 22, 1908. His injury, having been due to the negligence of a fellow-servant, could throw no liability on the defendant, had it occurred in this State, and were the question of liability to be determined by the common law of Connecticut. It did occur in Massachusetts, and he does not allege what the law of Massachusetts in respect to that question is. It is therefore to be presumed to be the same as that of this State. Lockwood v. Crawford, 18 Conn., 370.

If the plaintiff has a right of action it must be based on the law affecting the relations of the parties at the time and place of the injury. As to the merits and rights involved in actions, the law of the place where they originated is to govern. Wood v. Watkinson, 17 Conn., 500, 510. This is true of tort actions; at least when a wrong having been done, actionable under the law of the place of its commission, there is nothing in the public policy obtaining at the forum to stand in the way of granting a remedy. Wharton on Private International Law, 3d Ed., II, §478, b. The law of Massachusetts in respect to any claims on the defendant growing out of the plaintiff's injury being presumably the same as that of Connecticut, there can be no recovery unless by virtue of the Act of Congress which, if it affects proceedings in State courts, governs in each State alike.

Congress has what may be described in general terms as plenary power (Const., Art. I, Sec. 8) "to regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." Elsewhere in the Constitution certain limitations are specifically prescribed, and others may exist by virtue of the necessary implications from the dual system of political government—*imperium in imperio*—which that instrument created.

By its provisions the sovereignty of each of the States is as carefully guarded as that of the United States. Each was to remain free to maintain its own executive, legislative, and judicial magistracies. Nothing could be done by Congress to impair this right, in any State, so long as it preserved a republican form of government. The power to maintain a judicial department is one, incident to the inherent sovereignty of each State, " in respect to which the State is as

independent of the general government as that government is independent of the States." As to that power, "the two governments are upon an equality." The Collector v. Day, 11 Wall., 113, 126.

The judicial power of the United States is by the first section of their Constitution (Art. III), "vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and by the second section extends, among other things, " to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made under their Authority." "The better opinion is that the second section was intended as a constitutional definition of the judicial power which the Constitution intended to confine to courts created by Congress; in other words, that such power extends only to the trial and determination of 'cases' in courts of Record, and that Congress is still at liberty to authorize the judicial officers of the several States to exercise such power as is ordinarily given to officers of courts not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself." It was therefore held in the case from which this observation has been quoted that an Act of Congress, investing justices of the peace appointed under the laws of a State with authority to arrest and temporarily imprison deserters from a merchant vessel, was not objectionable on the ground that it gave them a judicial power belonging to the United States. Robertson v. Baldwin, 165 U. S., 275, 279, 280.

More recently the Supreme Court of the United States has stated that the first section of Article III grants "the entire judicial power of the Nation;" that the second section is neither "a limitation nor an enumeration," but "a definite declaration, a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power;" and that "all the judicial power which the Nation was capable of exercising" was vested in the tribunals described in the first section. Kansas v. Colorado, 206 U. S., 46, 82, 83. This power certainly included any authority which might be given them by Congress to take cognizance of judicial proceedings under statutes of the United States. "It is a sound principle that in every well organized government the judicial power should be coextensive with the legislative, so far at least as private rights are to be enforced by judicial proceedings." Kendall v. United States, 12 Pet., 524, 618.

We find, then, under our American system of government, each State possessing legislative power over most subjects, and having courts that may exercise a commensurate judicial power, and the United States possessing legislative power over a few subjects, and having courts that may exercise a commensurate judicial power.

The Act of Congress now in question creates a statutory right of action. It is one not existing at common law, nor in chancery. It is one which, if warranted by the Constitution of the United States, may, under their general laws regulating the jurisdiction of the Circuit Courts of the United States (U. S. Stat. at Large, XXV, 433), whenever damages exceeding $2,000 are claimed, be made the subject of judicial

proceedings in the Courts of the United States as a suit of a civil nature arising under the laws of the United States, without reference to the citizenship of the parties.

In view of these circumstances and conditions two questions present themselves at the threshold of the present case. The first is whether Congress intended by this Act to authorize the institution of an action under it in the courts of the States. The second is whether, if such were its intention, it had power to make it incumbent on the State court to assume jurisdiction.

The main provisions of the Act are these:

"SEC. 1. That every common carrier by railroad while engaging in commerce between any of the several States and Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

* * * * * * *

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to or the death of any of its employees such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured em-

ployee or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

* * * * * * *

SEC. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, * * * *."

Was it the intention of Congress to authorize the institution of the statutory form of action, thus created, in the courts of the States?

At common law a servant cannot recover from his master for injuries received from the negligence of a fellow servant, acting in the same line of employment. This is a part of that general American common law, resting upon considerations of right and justice that have been generally accepted by the people of the United States, in administering which in any State the Federal courts have not deemed themselves bound by the judicial decisions of that State as to what, according to its common law, are the limits of that doctrine there. The Supreme Court of the United States has treated it as a rule of general jurisprudence, especially when invoked in cases arising in the course of commerce between States, and as justly supported by the principle that negligence of a servant resulting in an injury to a fellow servant does not of itself prove any omission of care on the part of the master in his employment, and

only such omission of care can justify holding the master responsible. Baltimore & Ohio R. R. Co. v. Baugh, 149 U. S., 368, 378, 386.

The common law had established the fellow-servant doctrine upon two main considerations; one that above mentioned, viewing it as a rule of justice; and the other, viewing it as a rule of policy, in that it tended to make each servant more watchful of his fellows, and thus to promote the safety of all, as well as the efficiency of their common work.

Congress has now seen fit to give an action where the common law denied it. It makes a demand legal, which the common law deemed impolitic. It is not lightly to be presumed that these provisions were intended to found original proceedings in the courts of the States and to lay down for them new rules not only of right and policy but of procedure. Carpenter v. Snelling, 97 Mass., 452,458.

Sections 4 and 6 of the Act of 1908 clearly indicate that the action is one to be brought under the statute.

The methods of procedure which are prescribed can all be easily pursued in the Federal courts. Some of them it might be difficult or even impossible to follow in the courts of a State. Others could only be observed there at the cost of setting up in the same tribunal conflicting standards of right and policy and practice.

This may be illustrated by a reference to the existing jurisprudence and legislation of this State.

They allow a recovery for an injury resulting in death, whether instantaneous or otherwise, in an action surviving

to or brought by the executor or administrator, of not exceeding $5,000, provided suit be instituted within one year; the damages to be distributed, after deducting the costs and expenses of suit, half to the husband or widow, and half to the lineal descendants of the decedent, *per stirpes*; but if there be no such descendants the whole to go to the husband or widow, and if there be no husband or widow, to the heirs, according to the law regulating the distribution of intestate personal estate. Gen. Stat., §399; Public Acts of 1903, p. 149, Chapter 193. If the Act of Congress of April 22, 1908, applies to State Courts, it would, in an action under the Act, by virtue of Sec. 1, cut off grandchildren of the decedent in favor of his parents; and in the event of there being no surviving husband, widow, children or parent, exclude the next of kin who were not dependent on the decedent. It would also remove any limitation of the damages recoverable in case of a fatal injury, and by the terms of Sec. 6, double the time within which suit could be brought.

By virtue of Sec. 3, contributory negligence is to be no bar but, if proved, "the damages shall be diminished by the jury," in a certain proportion. Under our practice, suits of such a nature have been often tried, or heard in damages, before the court, without a jury. In such case, unless the statute could be interpreted to require the court to allow such a diminution, the purpose of this section would be frustrated.

Section 5 allows a set-off under certain circumstances. The action given is one founded on a tortious act or omission for which the defendant is made responsible. Set-off is purely a matter of statute. It was unknown to the com-

mon law. Our statutes allow it in certain causes sounding in contract, but not in any sounding in tort. Lovell v. Hammond, 66 Conn., 500, 508. If the Act of Congress can support an action brought under its provisions in a State court, it would force upon this State an extension of the privilege of set-off which our statutes have not thought it wise to permit.

It would also, by virtue of Sec. 6, double the time within which a railroad company can be sued in our courts by one of its servants, for personal injuries received while in its employment.

Under Gen. Stat., §1130, no action to recover damages for an injury to, or death of, any person, caused by negligence, can be maintained against any railroad company, unless written notice, containing a general description of the injury and of the time, place, and cause of its occurrence, as nearly as the same can be ascertained, shall have been given to the defendant within four months after the neglect complained of, unless the action itself is commenced within that period. That such a notice has been given is an essential allegation in the complaint. Peck v. Fair Haven & Westville R. R. Co., 77 Conn., 161.

No similar provision is made in the Act of Congress now in question and, if it applies to proceedings in State courts, no such allegation in cases brought under it would seem to be necessary. None was in fact made, in the case at bar, though the action was not brought until more than four months after the alleged date of the plaintiff's injury.

The question now under consideration is not whether Congress may not prescribe a new rule of right as to trans-

actions occurring in the course of commerce between the States, to be recognized and to control the disposition of causes in all courts, State and Federal. Undoubtedly it can. Schlemmer v. Buffalo Railway, 205 U. S., 1. It would be a change in substantive law, and thus alter so far forth the law of the land.

But the Superior Court was called upon to say whether the plaintiff could, under the Act of Congress of 1908, insist on its entertaining an original action, which could only be brought, if at all, under that Act, and which could only be sustained by disregarding many of the requirements of our own law with respect both to pleadings and evidence.

Another reason for considering this legislation as conversant only with proceedings in the Federal courts is afforded by the provision (Section 7) that the term "common carrier," as used in the Act, "shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier." By this a direct action is unconditionally given on the statute against a receiver.

Receivers stand for the court which appoints them. To sue them without leave of that court is contrary to the rules of chancery practice. By an Act of Congress passed in 1887 (24 U. S. Stat. at Large, 552), every receiver appointed by any court of the United States may be sued without its previous leave. The two Acts of 1908 and 1887, so far as they apply to Federal courts, are in this respect in entire harmony. But if the Act of 1908 were to be construed as warranting an action in a State court against a

receiver appointed by a State court, it would set up a new rule of practice for that State, and attack the dignity of its judicial department.

We have then a statute plainly intended to give an action in the courts of the United States and—assuming that it is not unconstitutional—well adapted to that purpose. It is a statute not expressly purporting to give an action in a court of a State, and which, in this State at least, is not in harmony with our system of administrative justice. If it gives such an action, it can only be on the ground that as its terms are general, and do not exclude State courts, a right to sue in them is implied.

Undoubtedly the courts of every State and of the United States together constitute, in a certain sense, one judicial system for the enforcement of legal rights; but it is not to be presumed that Congress would (if it could) require those of a State to enforce rights newly created by the laws of the United States, which can only be enforced by following modes of procedure not permitted by the State law, and opposed to the public policy which that law declares. Claflin v. Houseman, 93 U. S., 130, 136. Nothing short of express provisions or necessary implications in the language of an Act of Congress could suffice to force upon a State court the exercise of a jurisdiction so incompatible with the legislation and practice which constitute its ordinary and natural rules of action.

It is true that under the present statutes of the United States no action under the Act of 1908 would lie in a court of the United States unless the damages claimed exceeded $2,000. Congress may, however, well be deemed to have

had in mind the power of the plaintiff to claim what damages he pleases, and the rule that the sum named determines the jurisdiction.

But if Congress intended to give an action under the Act of April 22, 1908, in the courts of the States,as well as in those of the United States, it is our opinion that the Superior Court was justified in sustaining the demurrer.

The right to engage in commerce between the States is not a right created by or under the Constitution of the United States. It existed long before that Constitution was adopted. It was expressly guaranteed to the free inhabitants of each State by the Articles of Confederation (Art. IV) and impliedly guaranteed by Art. IV, Sec. 2, of the Constitution of the United States as a privilege inherent in American citizenship. Slaughter House Cases, 16 Wall., 36, 75; Gibbons v. Ogden, 9 Wheat., 1, 211; Crandall v. Nevada, 6 Wall., 35; Lottery Case, 188 U. S., 321, 362; The Employers' Liability Cases, 207 U. S., 463, 502.

The reserved powers of the States leave them charged with the sole duty and power of preserving public order and the security of persons and property within their territorial limits, except so far as, by or under the Constitution of the United States, it may be otherwise provided. A like duty and power exist with reference to the regulation of the private relations of employer and employee, and in general to the duties of common carriers. That a regulation so adopted by a State may incidentally affect commerce between the States does not render it invalid. Hennington v. Georgia, 163 U. S., 229, 317; New York, New Haven & Hartford R. R. Co. v. New York, 165 U. S., 628, 631; Chicago Railway v.

Solan, 169 U. S., 133, 137; Missouri Railway v. Haber, 169 U. S., 613, 635.

The State of Connecticut has under her laws, written and unwritten, so regulated the relations of employer and employee that no action can be maintained in her courts by a servant against his master for personal injuries sustained within her territorial limits through the negligence of one of his fellow servants, nor for such injuries sustained through the negligence of the master, combined with that of the plaintiff himself, when the latter's negligence essentially contributed to the result, whether it were or were not as great as the master's.

The servant of a common carrier falls within these rules. This is not because of the nature of his master's business. They apply to every servant and every master.

If it be assumed that Congress has power to prescribe a different rule for accidents occurring in or outside Connecticut in the course of running a railroad train between States, and to create a new statutory action for its enforcement cognizable by the courts of the United States, it cannot, in our opinion, require such an action to be entertained by the courts of this State.

It would open a door to serious miscarriages of justice through confusing our juries, if one rule of procedure were to be prescribed in one class of suits against an employer, and another, diametrically opposed to it, in another class of them. The same jurors might be instructed in one case that negligence on the part of the plaintiff constituted no defence, but might be considered in mitigation of damages, and in the next that he could not recover at all unless he proved

affirmatively that he met his injury when himself in the exercise of due care. They might be instructed in one case that a set-off was allowable, and in the next, under contractual conditions precisely similar, that a set-off was not allowable.

It would also compel courts established by a sovereign power, and maintained at its expense for the enforcement of what it deemed justice, to enforce what it deemed injustice.

If Congress may thus change the common law relations of master and servant by giving a new form and cause of action in the courts of the United States, it does not follow that they can give a servant a right to such a remedy in those of States where these relations remain unaltered.

The Act of 1908, furthermore, if constitutional, enlarges the judicial power of the courts of the United States by giving in a certain class of causes a judicial remedy where none previously existed. This remedy is by a plenary action. If we understand correctly the position of the Supreme Court of the United States, no part of the judicial power of the United States, when it is to be exercised in the form of an original plenary action, can be vested in any court not created by the United States. In Martin v. Hunter's Lessee, 1 Wheat., 304, 330, it was stated that "Congress cannot vest any portion of the judicial power of the United States except in courts ordained and established by itself." Houston v. Moore, 5 Wheaton, 1, 27, which reaffirmed this position, was the subject of consideration in Claflin v. Houseman, 93 U. S., 130, 141, where it was held to have decided "not that Congress could confer jurisdiction upon the State courts, but that these courts might exercise jurisdiction on cases authorized by the laws of the State, and not prohibited

by the exclusive jurisdiction of the Federal courts." Robertson v. Baldwin, 165, U. S., 275, 279, in words previously quoted, pronounces it as the better opinion that the Constitution was intended to confine to courts created by Congress the trial and determination of cases in courts of Record falling within the grant of federal judicial power.

This case does not present the question which might arise if the State of Connecticut by appropriate legislation had accepted for its courts the jurisdiction which the plaintiff invokes. If he could then maintain his suit, it would be because the State had in effect granted him the right to sue. Ex parte Knowles, 5 Calif., 300.

But if Congress may authorize a State court to entertain a plenary action created by law of the United States, it would not follow that the jurisdiction must be assumed. The judicial duty of the courts of a State is fulfilled when they administer justice as its laws require. Stephens, petitioner, 4 Gray, 559, 562. If they may, when not prohibited by the statutes of their State, accept jurisdiction of statutory actions given by Act of Congress, they are also free to decline it; and the objection may be taken by demurrer. Ely v. Peck, 7 Conn., 239.

The grounds of the demurrer filed in the case at bar, while challenging the constutionality of the Act of 1908, do not specifically raise the point now under discussion. It was, however, manifest on the face of the record and, the judgment that the complaint was insufficient being right, it is immaterial that this particular objection was not distinctly made. Thresher v. Stonington Savings Bank, 68 Conn., 201, 205; British American Insurance Co. v. Wilson, 77 Conn., 559, 564.

Thus far we have refrained from discussing the constitutionality of the Act, except as to the single objection that, if it can be considered as intended to give an action in the courts of the States, it goes in that respect beyond the powers of Congress. In our opinion it also transcends them otherwise.

By Sec. 1, the rule of *respondeat superior* is extended so as to make the common carrier by railroad between States responsible for an injury received by one of its servants in the course of his employment in inter-State commerce, due in whole or part to the negligence of any of its officers, agents, or employees, whether they are or are not, at the time, themselves employed in such commerce.

An inter-State carrier is generally also an intra-State carrier. It may have a considerable force of officers, agents or employees, engaged in business that is wholly local. Does the power to regulate commerce between the States go so far as to warrant imposing on a carrier responsibility to a servant engaged in that business for the consequences of the negligence of another of its servants, occurring when the latter was not engaged in it, nor indeed in any business for the common employer? If a freight clerk, whose duties are confined to keeping tally of goods consigned from one point to another in the same State, in an office devoted to that purpose, should carelessly discharge a rifle, a bullet from which should hit a brakeman on an inter-State train, a mile away, we are of opinion that it could not fairly be deemed a regulation of inter-State Commerce to hold the common employer responsible for the injury. The Employers' Liability Cases, 207 U. S., 463, 498. Nor would it be such a regulation,to make an inter-State railroad company liable

to a train hand, who, while going to work, was accidentally struck by an automobile directed by one of its vice-presidents or land agents while on a pleasure drive.

It is to be observed in this connection, also, that the Act is not concerned solely with cases of injuries to train hands. It includes those to any person who is employed by the carrier in inter-State commerce, and gives an action to his "or her" personal representative. A waitress employed by an inter-State railroad in a railroad restaurant, where local custom does not exist or is not served, could recover on the statute for an injury received from the negligence of a man hired by the carrier for some purpose purely of a local character.

Except so far as the Act is a regulation of commerce between the States, its enactment was beyond the power of Congress. That it remotely affects such commerce is not sufficient, if that result is only to be secured by invading the settled limits of the sovereignty of the States with respect to their own internal police. Williams v. Fear, 179 U. S., 270, 278; Keller v. United States, 213 U. S. 138; 29 Supreme Court Reporter, 470. The Act cannot be interpreted as referring only to negligence of employees while engaged in inter-State commerce. It substantially re-enacts in this particular the words of the previous Employers' Liability Act of 1906 (32 U. S. Stat. at Large, 232), and must be presumed to have been drafted with knowledge of the judicial construction which those words had received. The Employers' Liability Cases, 207 U. S., 463, 500.

The provision of Sec. 5 that any contract between an inter-State carrier and any of its employees in such business, intended to enable it to exempt itself from any lia-

bility created by the Act "shall to that extent be void," is, in our opinion, in violation of the Fifth Amendment to the Constitution of the United States, as tending to deprive the parties to such a contract of their liberty and property without due process of law. The contract may be one made on a full consideration by an employee, or one seeking to become such, who is fully capable of understanding its meaning and effect. He may be the General Manager of a great railroad system, the damages resulting from the loss of whose life might justly be estimated at a vast sum. His salary may have been agreed on in view of this provision of exemption. To avoid that, and yet let the other provisions of the contract stand, would necessarily work rank injustice. It would virtually deprive the carrier of its property, and—under the construction of that phrase adopted by the courts of the United States—do so without due process of law. Adair v. United States, 208 U. S., 161, 172.

The statute cannot be regarded in this respect as one made for the protection of an ignorant and improvident class, such as the Acts regarding shipping articles. The employees of a railroad company are, in general, men of more than ordinary intelligence. The dangerous nature of the business requires and secures this. It cannot be regarded as one made for the protection of train-hands, for it covers every kind of employees. It denies them one and all that liberty of contract which the Constitution of the United States secures to every person within their jurisdiction.

The Act, it is to be remembered, does not confine itself to avoiding a contractual provision for exemption from liability for the negligence of the carrier's servants while

engaged in carrying on the work of transportation. It avoids a provision for exemption from liability for the negligence of its servants while not engaged in carrying on the work of transportation, and even while not engaged in the line of their service, at all.

The provisions of Section 3 allow and apparently require the recovery of some damages, although the plaintiff's negligence was gross and that of his fellow employee slight. If, as aptly suggested by the defendant's counsel, an engineer, hearing but negligently disregarding an automatic warning bell, should derail his train at a switch negligently left open by the man in charge, and the latter be struck by an overturned car, each could recover from the common employer for any personal injury, although it came from a plain violation of known rules, and the employer's loss from the consequent destruction of life and property were enormous.

The doctrine of comparative negligence, as it has been generally understood where it obtains, is that slight negligence shall not defeat an action against one guilty of gross negligence. In the form assumed by the Act of 1908, it sanctions a recovery where the plaintiff has been guilty of gross negligence and the defendant of none at all. To hold the carrier liable in such case because of the imputed negligence of any officer, agent, or employee, whether the latter be at the time engaged in inter-State commerce or not, seems to us not an appropriate or legitimate regulation of commerce between the States, but rather an arbitrary and unlawful deprivation of property, within the meaning of the Fifth Amendment to the Constitution of the United States.

It serves to confirm this conclusion that the liability thrown upon the carrier by Sec. 1 is not confined to damages resulting solely from the negligence of its officers, agents, or employees. It is fixed and complete if such negligence contributes in any degree to the injury, although it be partly due to the act or omission of a mere stranger. There can be no contribution between wrong-doers. If, therefore, the carrier in such a case could be held under the statute, his property would be taken to pay for a wrong mainly, perhaps, done by one with whom it stood in no contractual relations and who, except for this particular act, had no connection with commerce between the States.

The Act gives a remedy for injuries causing death, without limitation of the damages recoverable, in favor of the executor or administrator; the fund to be distributed in a manner which is inconsistent with the law of every State with respect to the devolution of the estate of a deceased person. In our opinion, Congress cannot create such a right of action in favor of personal representatives of an inhabitant of a State. They are appointed, or their appointment is approved, by authority of the State, exercised through some court to which they are accountable. If the damages recoverable are to be treated as representing estate left by the decedent, it is for the State of his domicile to regulate their distribution. If they are to be treated as a fund created by this Act, which does not represent anything that ever belonged to the decedent, it was, in our opinion, not within the competency of Congress thus to bring into existence a new duty of executors or administrators to collect and a new duty of masters to pay what the decedent never owned. Such legislation falls solely within the sphere of the States.

It does not appear that Congress would have enacted this measure without the provisions on which we have thus commented. These parts of the statute cannot be severed from the rest and their invalidity renders it wholly void, so far as it applies to the case before us. The Employers' Liability Act Cases, 207 U. S., 463, 501.

A statute enacted in a jurisdiction where a written constitution obtains, is *prima facie* presumed by its courts, if its validity be questioned before them, to be in accord with that constitution. Whether such a presumption exists either in a State court or in those of the United States, in favor of an Act of Congress which, if valid, reduces the limits within which the sovereignty of the States has for more than a century been freely exercised, and especially of this Act, which by its title does not purport to be a regulation of inter-State or foreign commerce, but simply to relate "to the liability of common carriers by railroads to their employees in certain cases," we need not inquire. If the statute under review has the support of such a presumption, that support is overthrown by the considerations previously stated.

To sum up our conclusions, the judgment of the Superior Court was right on each of the following grounds:

1. Congress did not intend by the Act of April 22, 1908, to authorize the institution of an action under it in the courts of the States.

2. It had no power to make it incumbent on the State courts to assume jurisdiction of such an action.

3. The issues before the Superior Court involved the consideration of these points, which justified, of themselves, the dismissal of the plaintiff's action; but further,

4. The Act, so far as it concerns this cause, is wholly void by reason of certain of its provisions which cannot be separated from the rest.

There is no error.

In this opinion the other judges concurred.

Supreme Court of the United States

OCTOBER TERM, 1910.

No. [redacted] 120

EDGAR G. MONDOU,
Plaintiff in Error.

vs.

THE NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

BRIEF FOR DEFENDANT IN ERROR.

EDWARD D. ROBBINS,
JOSEPH F. BERRY,
Of Counsel.

The Tuttle, Morehouse & Taylor Co., Law Printers

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 313.

EDGAR G. MONDOU,
Plaintiff in Error,
vs.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Defendant in Error,

In error to the Supreme Court of Errors of the State of Connecticut.

BRIEF FOR DEFENDANT IN ERROR.

The two questions which are raised by this writ of error are yiz:—

First, whether Congress has the power to make it incumbent on the courts of the State of Connecticut to assume jurisdiction of this action arising under the Act of Congress entitled: "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases. Approved April 22d, 1908";

Second, whether said Act of Congress is unconstitutional and void, as exceeding the power of Congress to regulate commerce among the States, etc.

In discussing the first question we assume, for the sake of argument, that Congress did intend to make the jurisdiction of the State Courts concurrent with the Circuit Courts of the United States,—in other words, that Congress gave permission to the States to entertain jurisdiction in cases arising under this Act. Even though this be so, it is submitted that the State Courts of Connecticut or of any other State may decline the jurisdiction as offered and that there was no error in the decision of the Supreme Court of Errors of the State of Connecticut in declining jurisdiction in said case.

I.

THE POWER TO REGULATE COMMERCE AMONG THE SEVERAL STATES IS EXCLUSIVE WHEREVER THE MATTER IS NATIONAL IN ITS CHARACTER OR ADMITS OF ONE SYSTEM OR PLAN OF REGULATION.

Cooley vs. Board of Wardens, 12 How., at 319.
Welton vs. Missouri, 91 U. S., at 280.

There can be no question in this case that the act itself is national in its character and admits of only one system which to be effective must be uniform in its application.

Congress was given the power, under the United States Constitution, to regulate commerce among the several States and in accepting that right from the States, or the people thereof, the United States necessarily assumed the burdens incident to a proper regulation of that commerce. One of the burdens in respect to a proper regulation of that commerce is

the burden of maintaining courts in order to enforce the laws and treaties which shall have been made under this clause of the Constitution.

> "It is a sound principle that in every well organized government the judicial power should be co-extensive with the legislative so far, at least, as private rights are to be enforced by judicial proceedings."
>
> Kendall vs. U. S., 12 Peters, 524, 618.

> "The States, by adopting the Federal Constitution, transferred to the General Government the right to exercise a portion of the judicial power which had previously belonged to the several states. The intention was to make the judicial authority of the Federal Government co-extensive with its political powers."
>
> Valarnio vs. Thompson, 7 N. Y., at 579.

The Constitution provides: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish." (Article III, Sec. 1.) "The judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and the treaties made or which shall be made under their authority; to all cases affecting ambassadors, or other public ministers and consuls," etc. (Article III, Sec. 2.)

In the "Federalist," No. 82, Alexander Hamilton pointed out that the question of whether the judicial power as granted to the United States should be exclusive or concurrent with that of the State Courts depended upon whether the State Courts had jurisdiction of the causes prior to the adoption of the Constitution. He laid down the rule that the State Courts will retain the jurisdiction they now have unless it appears

to have been taken away in one of the enumerated modes and that this exclusive delegation of power can only exist in one of three cases,—first, where an exclusive authority is in express terms granted to the Union, second, where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the States, third, where an authority is granted to the Union, with which a similar authority to the States would be utterly incompatible.

This rule was followed in Claflin vs. Houseman, 93 U. S., 130. The general principle was laid down that where jurisdiction may be conferred on the United States Courts, it may be made exclusive where not so by the Constitution itself, but, if exclusive jurisdiction be neither expressed nor implied, the State Courts have concurrent jurisdiction whenever by their own constitution they are competent to take it.

> "The practice has been to affirm the jurisdiction where it is not excluded by express provision or incompatibility in its exercise arising from the nature of the particular case. The laws of the United States are as much the laws of any State as State laws are, and although in their enforcement exclusive jurisdiction may be given to the Federal Courts, yet, where such exclusive jurisdiction is not given or necessarily implied the State Courts having competent jurisdiction in other respects may be resorted to. In such case the State Courts do not exercise a new jurisdiction conferred upon them but their ordinary jurisdiction derived from the constitution under the State law."

It was further said:

> "—Not that Congress could confer jurisdiction upon the State Courts, but that these courts might exercise jurisdiction on cases authorized by the laws of the State and not prohibited by the exclusive jurisdiction of the Federal Courts."

In Hoxie vs. New York, New Haven and Hartford Railroad Company, 82 Conn., 356, it is said:

> "The judicial power of the United States is, by the first section of their Constitution (Art. III) 'vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish' and by the second section extends, among other things, 'to all cases in law and equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their authority.' 'The better opinion is that the second section was intended as a constitutional definition of the judicial power—which the Constitution intended to confine to courts created by Congress; in other words, that such power extends only to the trial and determination of cases in courts of record, and that Congress is still at liberty to authorize the judicial officers of the several States to exercise such power as is ordinarily given to officers of courts not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself.' It was therefore held, in the case from which this observation has been quoted, that an Act of Congress, investing justices of the peace appointed under the laws of a State with authority to arrest and temporarily imprison deserters from a merchant vessel, was not objectionable on the ground that it gave them a judicial power belonging to the United States. Robertson v. Baldwin, 165 U. S., 275, 279, 280, 17 Sup. Ct. Rep., 326."

The judicial power of the United States extends by the Constitution to controversies between citizens of different states as well as to the cases arising under the Constitution, treaties, and laws of the United States, and the manner and conditions upon which that power shall be exercised, except as the

original or appellate character of the jurisdiction is specially designated in the Constitution, are merely matters of legislative discretion. In some cases, from their character, the judicial power is necessarily exclusive of all state authority; in other cases it may be made so at the option of Congress, or it may be exercised concurrently with that of the states.

Chicago, etc., R. Co. v. Whitton, 13 Wall (U. S.), at 288.

Plaquemines Tropical Fruit Co. v. Henderson, 170 U. S., at 521.

Teal v. Felton, 12 How. (U. S.), 292.

Congress is at liberty to authorize the judicial officers of the several states to exercise such power as is ordinarily given to officers of courts not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself.

Dallemagne v. Moisan, 197 U. S., at 174.

Robertson v. Baldwin, 165 U. S., 278.

Congress may Exclude State Jurisdiction. It cannot be doubted that each of the original states had, prior to the adoption of the Constitution, complete and exclusive jurisdiction by its judicial tribunals over all legal questions, of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction. Nothing more was done by the Constitution than to extend the judicial power of the United States to specified cases and controversies; leaving to Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise juris-

diction concurrent with the courts of the several states. Plaquemines Tropical Fruit Co. v. Henderson, 170 U. S., 517.

II.

Congress Cannot Confer Jurisdiction upon the State Courts.

In Martin vs. Hunter, 1 Wheaton, at 334, in respect to the jurisdiction of the State Courts it is said:

> "In the first place, as to cases arising under the Constitution, laws and treaties of the United States and State Courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the State Courts previous to the adoption of the Constitution and it could not afterwards be directly conferred upon them. The Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States."

which was followed in Houston vs. Moore, 5 Wheaton, 27, where the Court said:

> "Congress cannot confer jurisdiction upon any courts although the State Courts *may* exercise jurisdiction on cases authorized by the laws of the State and not prohibited by the exclusive jurisdiction of the Federal Court."

In Dudley vs. Mayhew, 3 N. Y., 9, at 15, it was held that Congress could not confer jurisdiction upon the State tribunals and it has always been held that the State Courts will not or can not have jurisdiction of cases involving a penalty under the United States laws.

Davidson vs. Champlin, 7 Conn., 244.
State vs. Curtiss, 35 Conn., 374.

In United States vs. Lathrop, 17 Johnson (N. Y.), 4, at 8, it was said:

> "How far Congress can confer power or jurisdiction upon the State Courts and whether these Courts, if the Act was silent upon the subject of jurisdiction, could take cognizance of actions for penalties and forfeitures incurred under the laws of the United States, remains to be considered. We have seen that the judicial power of the United States is to be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. On this clause of the Constitution we have the direct opinion of the Supreme Court in the cases of Martin vs. Hunter, Lessees, (1 Wheaton, 330), that 'Congress cannot vest any portion of the judicial power of the United States except in courts ordained and established by itself.' Indeed, it appears to me too plain for discussion that the expression in the Constitution 'and in such inferior courts as Congress may from time to time establish' can have no reference to the courts established by the respective State legislatures. The conferring of jurisdiction on such courts is not to ordain and establish them and in no sense can the State Courts become the inferior courts intended in the Constitution."

In Ex Parte Knowles, 5 Cal., 301, the Court said:

> "Congress has no power to confer jurisdiction upon the courts of a state because, first, the Constitution gives it no such power; second, the Constitution expressly declares that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. Martin v. Hunter, 1 Wheaton, 304; Maryland v. Butler, 12 Mles Reg. 115, U. S. v. Lathrop, 17 Johnson 4; State v. McBride, Rice R., 400. The Constitution having thus fixed where the judicial power shall be vested it cannot be vested elsewhere.

> It was urged in the course of argument and some authorities cited to the effect that the Congress could not confer jurisdiction on a state so as to compel its exercise, yet it would be legitimate if the court was willing to accept it. This is to me a solecism. A court is the creature of the Constitution and laws under which it exists. To exercise any power not derived from such Constitution and laws would necessarily be usurpation. It sounds curious to say 'Congress has no authority to give this power to the Court, yet the Court exercises this power by virtue of the authority of Congress'."

Chancellor Kent, in his "Commentaries," 12th ed., star page 399, states that the Supreme Court disclaimed the idea that Congress could authoritatively bestow judicial powers on state courts and magistrates.

Kent's Commentaries, Vol. 1, star page 399:

> "In the case last referred to (Houston v. Moore, 5 Wheaton, 1) the Supreme Court disclaimed the idea that Congress could authoritatively bestow judicial power on state courts and magistrates. 'It was held to be perfectly clear that Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States, although the State courts may exercise jurisdiction in cases authorized by the laws of the state and not prohibited by the exclusive jurisdiction of the federal courts.'"

Page 400:

> "The conclusion then is that in judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress and may be revoked and extinguished whenever they think proper, in every case in which the subject matter can constitutionally be made cognizable in the federal courts; and that, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction, in all cases where they had

jurisdiction originally over the subject-matter. We will next see whether this state jurisdiction does not equally depend upon the volition of the state courts.

There are various acts of Congress in which duties have been imposed on state magistrates and courts, and by which they have been invested with jurisdiction in civil suits, and over complaints and prosecutions in penal and criminal cases, for fines, penalties, and forfeitures, arising under laws of the United States. We have seen a very clear intimation given by the judges of the Supreme Court that the state courts were not bound, in consequence of any act of Congress, to assume and exercise jurisdiction in such cases. It was merely permitted to them to do so, as far as was compatible with their state obligations; and in some instances the state courts have acted in those cases, and in other instances they have declined jurisdiction, though expressly vested with it by the act of Congress."

In Rushworth vs. Judges of Common Pleas, 58 N. J. L., 97, the Court said:

"Congress is without power to interfere with or control state courts, except in so far as the federal courts have appellate jurisdiction.

Congress cannot without the consent of the State constrain the State courts to entertain or act upon applications for naturalization."

"If Congress has without the consent of the State the power to impose such a duty upon the State courts there is no legal limit to the authority of the national legislature to burden the State courts with such a volume of business as to eventually surpass their capacity to exercise the judicial functions for which they were created by the State.

The inabilty of Congress thus to fetter and disable the instrumentalities provided by the State for carrying on the operations of its own government was the ground upon which the power of the federal government to lay an income tax on the salaries of the State judges was denied in Collector vs. Day, 11 Wall, 113. No surrender of the State to right to establish

courts define and limit their jurisdictions and functions and to regulate and control them in all respects, except as to appellate jurisdiction."

As Congress cannot vest any of the judicial power of the United States in the State Courts it is bound to create inferior courts in which to vest jurisdiction in cases arising under its Acts. These courts have been created and cases arising under the Act should be tried in courts ordained and established by the Congress, which are adapted better to enforce the Act in a uniform manner than courts established by the State.

So, while conceding that Congress may have intended the State Courts to assume jurisdiction, Congress cannot compel the State Court to entertain it against its wish.

III.

THE TENTH AMENDMENT READS, "THE POWERS NOT DELEGATED TO THE UNITED STATES BY THE CONSTITUTION NOR PROHIBITED BY IT TO THE STATES ARE RESERVED TO THE STATES RESPECTIVELY OR TO THE PEOPLE."

The reservation to the States respectively means the reservation of the right of sovereignty which they respectively possessed before the adoption of the Constitution and which they had not parted from by that instrument, and any legislation by Congress beyond the limits of the power delegated would be trespassing upon the rights of the States or the people and would not be the supreme law of the land but null and void.

Mr. Justice Brewer, in U. S. vs. Williams, 194 U. S., at 295.

Ex Parte Merryman, 17 Fed. Cases, 9, 487.

Collector vs. Day, 11 Wall (U. S.), 124.

The several state legislatures retain all the powers of legislation delegated to them by the State Constitutions which are not expressly taken away by the Constitution of the United States. The establishing of courts of justice, the appointment of judges, and the making of regulations for the administration of justice within each State according to laws on all subjects not intrusted to the Federal Government is the peculiar and exclusive province and duty of the State legislatures.

Calder vs. Bull, 3 Dallas (U. S.), 388.

Article V, Section 1, of the Connecticut Constitution prescribes that the judicial power of the State shall be vested in a Supreme Court of Errors, a Superior Court, and such inferior courts as the General Assembly may from time to time establish, the powers and jurisdictions of which courts shall be defined by law.

Can it be within the power of Congress to prescribe that the Superior Court of Connecticut must assume jurisdiction of a cause of action based upon an Act the terms of which are entirely incompatible with its system of jurisprudence?

Chancellor Kent says in his "Commentaries," 12th ed. star page 403:

> "The doctrine seems to be admitted that Congress cannot compel a state court to entertain jurisdiction in any case. It only permits state courts which are competent for the purpose and have an inherent jurisdiction adequate to the case to entertain suits in the given cases; and they do not become inferior courts in the sense of the Constitution, because they are not ordained by Congress. The state courts are left to infer their own duty from their own state authority and organization; but if they do voluntarily entertain jurisdiction of causes cognizable under the authority of the United States, they assume it upon the condition that the appellate juris-

> diction of the federal courts shall apply. Their jurisdiction of federal causes is, however, confined to civil actions, or to enforce penal statutes; and they cannot hold criminal jurisdiction over offences exclusively existing as offences against the United States. Every criminal prosecution must charge the offence to have been committed against the sovereign whose courts sit in judgment upon the offender, and whose executive may pardon him."

Must the State Courts of Connecticut as well as of other States, whose calendars are now crowded with negligence cases, be compelled to maintain extra judges and courts necessary to carry into effect the Acts which Congress shall pass?

There is much respectable authority to the contrary:

> Congress has no right to require that state courts shall entertain suits for the objects and purposes declared in a bankrupt law. The states, in providing their own judicial tribunals, have a right to limit, control, and restrict their judicial functions, and jurisdiction according to their own mere pleasure. They may refuse to allow suits to be brought there 'arising under the laws of the United States' for many just reasons; first, that Congress are bound to provide such tribunals for themselves; secondly, that state courts are not subject to the legislation of Congress as to their jurisdiction; thirdly, that it may most materially interfere with the convenience of their own courts and the rights of their own citizens, and be attended with delays in the administration of justice, to allow their courts to be crowded with suits arising under the laws of the United States; and fourthly, as in the present case, that it would involve the state courts in almost endless examinations and discussions of the principles and bearings of the bankrupt law, confessedly a system novel in our jurisprudence, intricate in its details, and involving questions exceedingly complicated, and difficult in its practical operation. Mitchell v. Great Works Milling, etc., Co., 2 Story (U. S. 648, 17 Fed. Cas., No. 9, 662).

The power of the State Courts to determine what cases they will accept jurisdiction of is absolute, for the power to maintain a judicial department is one incident to the inherent sovereignty of each State, in respect to which the State is as independent of the General Government as that Government is independent of the States. As to that power the two governments are on an equality.

Collector vs. Day, 11 Wall (U. S. 113, 126).

In Stearns et al vs. United States, 2 Paine, 300, Federal Cases, No. 13,341, which was an action of debt on a bond given for the liberties of a prison upon a writ of error to the District Court of the State of Vermont, it was held:

> "Congress may vest exclusively in the courts of the United States all the judicial power of the United States; and no part of the criminal jurisdiction of the United States can consistently with the Constitution be delegated to the State tribunals.
>
> The State Courts may exercise jurisdiction in all cases authorized by the laws of the State and not prohibited by the exclusive jurisdiction of the Federal Courts. Congress may revoke and extinguish the concurrent jurisdiction of the State tribunals in every case in which the subject matter can constitutionally be made cognizable in the Federal Courts. But without an express provision to the contrary, the State Courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject matter. It is, however, optional with the State Courts to exercise such jurisdiction or not.
>
> The State Courts are not inferior tribunals in the sense of the Constitution. Congress cannot therefore compel them to entertain jurisdiction in any case, but leaves them to consult their own duty from their own state authority and organization."

Sherman vs. Bingham et al, Fed. Cases, No. 12,762, 21 F. C., 1,273:

"Beyond doubt, Congress in enacting the bankrupt law intended to make it uniform throughout the United States and in order to secure such uniformity Congress obviously intended to create or to designate tribunals and officers to execute all its provisions; but it is clear that if the supposed defect of jurisdiction exists in the district courts that the act neither creates nor designates any tribunal which is obliged to exercise such jurisdiction. Suppose it to be conceded that such a suit may be prosecuted in a State court, the concession will not give any support to the theory of the defendant, as it is settled constitutional law that Congress cannot compel a State court to entertain jurisdiction under an act of Congress in any case, that it is optional with them in all cases whether to entertain jurisdiction or not; that they are left to consult their own duty from their own state authority."

Beavin's Petition, 33 N. H., 89, holds:

"Under the Constitution of the United States every state is at liberty and has the exclusive right to prescribe the remedies and limit the times as well as mode of redress in its own judicial tribunals and to deny to them jurisdiction over cases which its own policy or institutions prohibit or discountenance.

Exclusive jurisdiction over the subject of naturalization of foreigners is vested by the Constitution in Congress with full power to constitute all necessary tribunals and make and establish all laws and regulations requisite and proper for the exercise of that jurisdiction. There is therefore no implied obligation on the ground of convenience or efficiency on the part of the States to furnish tribunals or enact laws to aid in the administration of a system of naturalization which it is the exclusive privilege and appropriate duty of the national government to establish and enforce.

A law of New Hamsphire prohibiting all the judicial tribunals of the State except the Court of Common Pleas from holding or exercising any jurisdiction in the administration of the naturalization laws of Congress is valid and constitutional."

Stephens, Petitioner, 70 Mass., 559 (4 Gray):

> "But we are of opinion that the powers which the legislature, by the statute in question, have prohibited the courts and magistrates of the State from exercising, do not extend to any cases, where duties are required by the Constitution of the United States, or by any laws of congress made pursuant to the constitution. The power of naturalization being vested exclusively in the government of the United States, congress have very properly provided for its exercise by the courts of the United States; and the superadded power by the act, giving the same jurisdiction to the courts of the State, is not necessary to the just rights of those entitled by law to the privilege of becoming citizens. These powers given to state courts are therefore naked powers, which impose no legal obligations on courts to assume and exercise them, and such exercise is not within their official duty, or their oath to support the constitution of the United States.
>
> But whatever may be the authority of congress to require the performance of duties by state courts, magistrates and officers, not affecting the organization of the national government, or not expressly provided for by the Constitution (respecting which there may be some doubt) it is well established that such courts and magistrates may, if they choose, exercise the powers thus conferred by congress, unless prohibited by state legislation. Prigg v. Pennsylvania, 16 Pet. 622.
>
> The decision of this principle accounts for the fact that this jurisdiction on the subject of naturalization was so long exercised by the courts of the Commonwealth, and that such jurisdiction was strictly legal. But according to our view of the Constitution of the United States and the laws of congress made pursuant to it, expounded in reference to the powers reserved to the states, since the government of this commonwealth has declared that the courts and magistrates appointed by it shall not exercise jurisdiction over the subject of naturalization, it is not competent for this court to grant the present petition.

> We must carefully distinguish this from a class of cases where, under the authority vested in the general government, and by laws passed by congress, within the scope of their authority, duties are imposed on the state government, or on the governor, judges, magistrates or officers of the State. These, by force of the Constitution of the United States, become the supreme law of the land, and therefore cannot be affected by any state legislation. On the contrary, all state officers, being sworn to support the Constitution of the United States, would be bound to act in conformity with the laws of the United States thus rightfully made, if, unhappily, any conflict should arise between the laws of the United States and those of the Commonwealth."

Nowhere in the United States Constitution can it be found that the States have given up to the Federal Government the power which they originally possessed of assuming or denying jurisdiction of any particular cause of action, and this power never having been granted to the Federal Government, neither expressly or impliedly, and never having been prohibited to the States, they may assume or decline to assume the jurisdiction as granted.

In re Woodbury, 98 Fed. Rep., 833.

IV.

THE EXERCISE OF JURISDICTION IN THIS CASE IN THE STATE COURTS IS ENTIRELY INCOMPATIBLE WITH THE LAWS OF THE STATE AND THE ACT HAS BEEN DEEMED TO BE BOTH IMPOLITIC AND UNJUST.

The Act lays down new rules of procedure to be followed, it differs in respect to the State law in that contributory negligence of the plaintiff is not a bar to recovery, which is con-

trary, and always has been, to the fundamental law of the State of Connecticut.

The same is true in regard to the doctrine of assumption of risk. It also puts into effect an entirely new statute of distribution in regard to the estates of deceased persons; it makes new rules in regard to the law of set-off; it establishes the doctrine of comparative negligence which has never been applied in the State of Connecticut and which is deemed to be unwise and unjust; where notice of injury is required to be given in actions brought in the State Courts, within four months from the time of the injury received, under the Act no notice is required. The Act also removes the limitation of damages, which are limited to five thousand dollars in the State of Connecticut in case of death. It also doubles the time within which suit may be brought. It allows an action against a receiver without leave of the court, which sets up a new rule of practice never before heard of in the State Courts and which would seriously interfere with the proper exercise of the power of the receiver to administer the trust as the State Court which appointed him might require.

There are vital reasons why the State Courts are not obliged to assume jurisdiction of this action and one of the principal reasons is that the Act, to be enforced in the State Courts, can be enforced only at the expense of disregarding many of the requirements of the law in Connecticut both in respect to pleadings and in respect to evidence.

The rule is well settled that Congress cannot provide rules of evidence which the State Courts are bound to follow.

People vs. Gates, 43 N. Y., 40.
Caldwell vs. N. J. Steamboat Co., 47 N. Y., 282.
Moore vs. Moore, 47 N. Y., 467.

Bowlin vs. Commonwealth, 2 Bush (Ky.), 5; 92 Am. Dec., 468.

Carpenter vs. Snelling, 97 Mass., 452.

In the latter case it was held that the provision in the United States Statutes of 1886 (Chapter 184, Sec. 9), which is as follows:

> "That hereafter no deed, instrument, document, writing or paper required by law to be stamped which has been signed or issued without being duly stamped or with a defective stamp, nor any copy thereof, shall be recorded or admitted or used as evidence in any court until a legal stamp or stamps denoting the amount of tax shall have been affixed thereto as prescribed by law."

applies only to courts of the United States.

The Court says, on page 458:

> "This provision can have full operation and effect if construed as intended to apply to those courts only which have been established under the constitution of the United States and by acts of Congress, over which the federal legislature can legitimately exercise control, and to which they can properly prescribe rules regulating the course of justice and the mode of administering justice. We are not disposed to give a broader interpretation to the statute. We entertain grave doubts whether it is within the constitutional authority of Congress to enact rules regulating the competency of evidence on the trial of cases in the courts of the several states, which shall be obligatory upon them. We are not aware that the existence of such a power has ever been judicially sanctioned. There are numerous and weighty arguments against its existence. We cannot hold that there was an intention to exercise it, where, as in the provision now under consideration, the language is fairly susceptible of a meaning which will give it full operation and effect within the recognized scope of the constitutional authority of Congress."

A few of the rules of evidence which are affected by the Act are as follows: In case there has been a violation by the common carrier of the Safety Appliance Acts, under the Act evidence of contributory negligence would be inadmissible and in like manner evidence in regard to the assumption of risk would be inadmissible,—that is, plaintiff's knowledge of the violation of the Safety Appliance Act would not avail as a defense in any way, nor cast any burden upon the plaintiff to exercise more care. Such clauses in the Act clearly have the effect of prescribing as to what evidence shall be admissible in trial in the State Courts, which it has been many times held cannot be done by a Congress.

In Section 5 of the Act it is provided that "any contract, rule, regulation, or device whatsoever, the purpose and intention of which shall be to enable any common carrier to excuse itself from liability created by this Act shall to that extent be void." This section plainly prescribes a rule of evidence to be followed in the State Courts, and for that reason the State Courts may decline to accept jurisdiction.

The rule in respect to set-offs is set forth in Section 5 and is not at all in harmony with the law of the State.

One of the most vital objections which the State Court may offer as an excuse for refusing to assume jurisdiction is that contained in Section 7 of the Act, which gives the right to bring an action against a receiver of a corporation, irrespective of whether the receiver is appointed by authority of a State Court or not. The Court which appoints the receiver clearly has the right to decide for itself whether the receiver, acting for the Court, shall be sued in any action. Although this section is not contrary to practice in the federal courts, by reason of the fact that every receiver appointed by a court of the

United States may be used without its previous leave, it is, however, contrary to the practice of the State Court and sets up a new rule which the State Courts may well object to. No action against a receiver may be had except by permission of the Court which appointed the receiver.

Barton vs. Barbour, 104 U. S., 126.

Tobin vs. Central Vermont Railway Co., 185 Mass., 337.

Passage vs. D. & Mt. M. R. R. Company, 58 N. Y., Supp., 770.

Suits under this Act may be well brought within the courts of the United States, which courts are in harmony with it in many respects. Congress evidently intended to have as much uniformity in the application of the Act as possible and only by its enforcement in the courts of the United States can this be accomplished.

All actions brought under the Interstate Commerce Law for penalties and complaints made in regard to rates, and so forth, are brought exclusively in the courts of the United States, as it is desirous to obtain uniformity in decisions.

In Sheldon vs. Wabash Railroad, 105 Fed. 785, which was an action brought under the Interstate Commerce Act, the Court says:

> "There is not and never has been any jurisdiction at common law over commerce between the States, and the Interstate Commerce Act creates rights and remedies not existing at common law and which the Federal Government had sole power to create. No action, therefore, can be maintained in a State Court."

The doctrine of comparative negligence has been recognized in the United States in case of admiralty and maritime juris-

diction but such doctrine has been rarely applied in the State Courts.

It is provided in Sections 3 and 4 of the Act that no employé shall be held guilty of contributory negligence, nor shall he be held to have assumed the risks of his employment in any case where there is a violation by such common carrier of any statute enacted for the safety of employés which contributed to the injury or death of such employés. These clauses must clearly be intended to apply only to violations of statutes enacted by Congress. Otherwise, the Act in its application would be open to the objection that uniformity of decision would be impossible. It is clear that Congress had in mind only the Acts passed by it, in respect to these sections. This Act is plainly intended to give an action in the courts of the United States and although the State Courts are not excluded and jurisdiction in them may be implied, yet it is submitted that the courts of the State of Connecticut, not being willing to accept jurisdiction, may decline to do so and it is not error for them to so decline.

It is submitted that the reasons of the Supreme Court of Errors of the State of Connecticut as set forth in the case of Hoxie vs. The New York, New Haven and Hartford Railroad Company, 82 Conn., 352, are sufficient to warrant this Court in holding that the State Courts of Connecticut are not obliged to assume jurisdiction in cases arising under an act which is not in harmony with Connecticut's system of administrative justice and which sets up rules of evidence and procedure which could only be sustained by disregarding many of the requirements of the law of the State of Connecticut, both with respect to pleadings and evidence.

V.

The question raised in this writ of error regarding the constitutionality of the Act itself, we understand, is raised in the cases of Northern Pacific Railway Company vs. Babcock, Admx., No. 283 and New York, New Haven and Hartford Railroad Company vs. Walsh, Admx., Nos. 558 and 559. Therefore, although not waiving our contention that the Act is unconstitutional and not within the power of Congress to enact, we prefer to leave the argument of this question with counsel in the other cases.

Respectfully submitted,

JOSEPH F. BERRY,
EDWARD D. ROBBINS,

New Haven, Connecticut.